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Supreme Court, U.S.
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NO. _____

IN THE SUPREME COURT OF THE
UNITED STATES

October Term, 1987

H. RAY EVERS, M.D.,
Appellant,

VS.

THE BOARD OF MEDICAL
EXAMINERS, et. al.,
Appellees.

ON APPEAL FROM THE ALABAMA COURT OF
CIVIL APPEALS

JURISDICTIONAL STATEMENT--STATE CIVIL CASE

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QUESTIONS PRESENTED

1. Whether, in a medical license revocation proceeding, the doctor's right to procedural due process is violated when the following interconnections exist between the adjudicatory agency (judge) and the prosecuting agency (prosecutor):

(i) the prosecutor pays the judge's per diem, travel, and other expenses;

(ii) ex parte communications or recommendations between the prosecutor and the judge are required by law;

(iii) the prosecutor pays for and furnishes all employees and facilities used by the judge;

(iv) the prosecutor must pay the costs and expenses of litigation involving the judge and may, in its sole discretion, purchase liability insurance for the judge;

(v) one of the prosecutor's in-house attorneys is also the chief counsel for the judge, and also served initially as hearing officer in the case;

(vi) it appears that the in-house attorney had ex parte communications about the doctor's case with the judge's attorney; and

(vii) the prosecutor's attorney and the judge's attorney are paid by the prosecutor.

2. Whether, assuming arguendo that no one of those seven direct personal and financial ties between the prosecutor and the judge violate the doctor's due process rights, the cumulative effect of such ties violate due process.

3. Whether the lower court erred by ignoring Gibson v. Berryhill, 411 U.S. 564, (1973), which held that possible bias will disqualify members of an ajudicatory board from passing judgment

on whether to revoke a licensee's license to practice his profession.[1]

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[1] The parties to the proceeding in the Circuit Court of Montgomery County, Alabama, were: The Board of Medical Examiners; The Medical Licensure Commission; W. Earle Riley; William D. Lazenby; Ernest C. Brock, Jr.; Richard H. Esham; Garland C. Hall; Jack Hyman; Patrick B. Jones; Stephen G. Lauten; Julius Michaelson; Peter W. Morris; Ira B. Patton; William C. Waller; James E. West; Kenneth C. Yohn; and James A. Pittman, Jr., in their official capacity as members of the Board of Medical Examiners and of the Board of Censors of the Medical Association of the State of Alabama; Leon C. Hamrick; Jerry N. Gurley; Thomas H. Alphin; Richard Harris; E. Gaylon McCollough; Thomas C. Nolan and Dale E. Trammell, in their official capacity as members of the Medical Licensure Commission.

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OPINIONS BELOW

On October 9, 1986, the Circuit Court of Montgomery County, Alabama, in a one-page unreported opinion (a copy of which appears in the Appendix), rendered a decision dismissing the Appellant's complaint. Appellant filed a timely appeal, and on March 18, 1987, the Court of Civil Appeals of the State of Alabama

rendered a written decision affirming the Circuit Court. The opinion is set out in the Appendix. On April 22, 1987, the Court of Civil Appeals of the State of Alabama overruled the Appellant's timely application for rehearing, without opinion. Appellant filed a Petition for Writ of Certiorari in the Alabama Supreme Court, which was granted on July 21, 1987. On December 4, 1987, however, the Alabama Supreme Court quashed the Writ of Certiorari to the Court of Civil Appeals, without opinion. Thus, the March 18, 1987, opinion of the Court of Appeals of the State of Alabama stands as the final order of the highest court of the state.

JURISDICTION

This case began when Dr. H. Ray Evers, M.D., the Appellant, filed a complaint against the Board of Medical

Examiners, the Medical Licensure Commission, and the individual members of those boards. The complaint sought to enjoin as illegal and unconstitutional the disciplinary proceedings brought against Dr. Evers by the Board and filed with the Commission (which, under state law, decides whether to suspend or revoke medical doctors' licenses). The federal due process question was timely raised by appellant in his pleadings and has been raised continuously on appeal.

On October 9, 1986, the Circuit Court of Montgomery County, Alabama (the trial court) entered a final order, without opinion, denying the requested relief. After timely appeal, the Alabama Court of Civil Appeals, on March 18, 1987, affirmed the lower court. The opinion of the Court of Civil Appeals of Alabama upheld as constitutional the

state statutes attacked as unconstitutionally violative of Appellant's state and federal due process rights. Appellant's timely application for rehearing was denied without opinion on April 22, 1987.

The Alabama Supreme Court, on July 21, 1987, granted Appellant's Petition for Writ of Certiorari to the Alabama Court of Civil Appeals. After briefs were filed and oral argument was heard, that Court, on December 4, 1987, quashed its writ of certiorari without opinion as improvidently granted. Thus, on December 4, 1987, the opinion of the Alabama Court of Civil Appeals became, in effect, the final decision of the highest court of the State of Alabama.

On February 17, 1988, Appellant H. Ray Evers, M.D. filed with the Alabama Court of Civil Appeals his Notice of

Appeal to the Supreme Court of the United States.

Jurisdiction before this Honorable Court is invoked pursuant to 28 U.S.C. § 1257(2), because the Alabama Court of Civil Appeals' opinion upheld state statutes in the face of federal constitutional attacks.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fourteenth Amendment to the United States Constitution, Section 1, provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

Section 1257(2), 28 U.S.C. provides:

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> . . .
>
> (2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.

Alabama Code § 34-24-53 (see Appendix).

Alabama Code § 34-24-54 (see Appendix).

Alabama Code § 34-24-311 provides:

> The above constituted [Medical Licensure] commission shall have the exclusive power and authority to issue, revoke and reinstate all licenses authorizing the licensee to practice medicine or osteopathy in the State of Alabama. The

> commission shall have the authority to promulgate such reasonable rules and regulations as it deems proper for implementing and carrying out the provisions of this article. However, prior to exercising its power and authority to issue, revoke or reinstate licenses, or to promulgate rules and regulations, the medical licensure commission shall receive and consider but not be bound by the recommendation of the state board of medical examiners.

Alabama Code § 34-24-312 provides:

> All personnel and facilities necessary to administer and enforce this article shall be furnished by the state board of medical examiners. All money, funds, fees, charges, and other receipts provided for in this article shall be paid to the state board of medical examiners and used by said board to carry out the provisions of this article.

Alabama Code § 34-24-361 (see Appendix).

Alabama Code § 41-22-18(a) (see Appendix).

STATEMENT OF THE CASE

General

On November 25, 1985, the Alabama Board of Medical Examiners ("Board") filed a complaint with the Alabama Medical Licensure Commission seeking to revoke Dr. H. Ray Evers' medical license. The allegations of the complaint filed against Dr. Evers are not directly pertinent hereto; however, the allegations regard the medical treatment of Mrs. Maxie Walker, now deceased. It is undisputed that Mrs. Walker died of cancer, not as a result of injuries stemming from her treatment by Dr. Evers, as erroneously stated in the opinion of the Court of Civil Appeals.

The Alabama Board of Medical Examiners, which investigates and prosecutes charges brought against doctors in Alabama, is composed solely of

persons who are members of the private Medical Association of the State of Alabama (MASA) and is, in fact, the governing body of that private association. Dr. Evers is not a member of MASA; he voluntarily terminated his membership more than ten years ago. Dr. Evers has not attempted to rejoin MASA and has no intention of doing so.

Dr. Evers has not reapplied for membership in the private association because that organization takes various political views with which he strongly disagrees. For example, MASA has lobbied in favor of tort reform legislation and, in fact, has imposed a mandatory financial assessment on all of its members in order to support such legislation. If a medical doctor does not pay his membership dues--which includes the involuntary assessment--then

his membership is taken away from him. Dr. Evers does not want to belong to an organization that espouses such legislation or to have an assessment involuntarily imposed upon him. Moreover, Dr. Evers does not want to belong to MASA because it has taken positions in the legislature and elsewhere contrary to the positions of other allied health professionals such as optometrists, podiatrists, and chiropractors.

The Board of Medical Examiners

The Alabama Board of Medical Examiners is composed solely of the elected members of the board of censors of MASA. In fact, pursuant to Alabama Code section 34-24-53, the board of censors of MASA is designated, as a body, as the Alabama Board of Medical Examiners. Presently, MASA's

constitution provides for twelve members of the board of censors. However, the number of members can be changed by the medical association at any time by simply amending its own constitution and by-laws. In order to be a member of the Board of Medical Examiners, an individual must be a member of MASA.

Pursuant to Alabama Code sections 34-24-361 and 34-24-311, the Board of Medical Examiners is given the power to investigate and prosecute medical doctors who are alleged to have committed acts or offenses for which their licenses can be revoked. In addition, the Board of Medical Examiners functions as a grand jury in determining which complaints will be filed.

Members of the Board, whose position may be changed or eliminated by the members of MASA at any time, may hire

investigators and lawyers, file complaints, and participate in hearings. In addition, the Board, by statute, must make a recommendation to the Medical Licensure Commission before any decision may be reached by the Commission in licensure proceedings. Ala. Code §§ 34-24-312, -361.

The Board of Medical Examiners is charged, by statute, with paying the members of the Medical Licensure Commission; paying the Medical Licensure Commission's expenses; and paying for other emoluments. Ala. Code §§ 34-24-53(b), -54.

The Board of Medical Examiners provides the office space for the Medical Licensure Commission. The space provided is presently in a building owned by the Medical Association (MASA). Both the Board and the Medical Licensure

Commission are physically located within the same building.

The Board pays the salary of the Licensure Commission's hearing officer and chief counsel. All funding for the Medical Licensure Commission is provided by the Board. The Board, in its sole discretion, even pays for the liability insurance for members of the Medical Licensure Commission and sets the Commission's annual budget.

Mr. Wendell Morgan, presently general counsel for the private Medical Association, is also chief counsel for the Board of Medical Examiners. He is paid by both the Medical Association and by the Board. As general counsel for the Board of Medical Examiners, Morgan participates in investigating, filing, and prosecuting complaints before the Medical Licensure Commission. Morgan's

assistant counsel for the Board of Medical Examiners is Mr. Mark McDonald. McDonald is also general counsel for the Medical Licensure Commission. For his work for both boards, McDonald receives one check, which comes from Board funds. Attorney McDonald worked for both the Board and the Commission during the Evers investigation and prosecution.

Besides the two hats he wore as assistant counsel for the Board of Medical Examiners (the prosecuting entity in this matter) and general counsel for the Medical Licensure Commission (the adjudicating body in this matter), McDonald also wore the hat of hearing examiner for the Licensure Commission. In this third role McDonald advised the Commission on legal and procedural matters pending before the Commission and concerning the Board. Thus, Mr.

McDonald, during portions of this case, wore all three hats simultaneously despite an express proscription of such conflicts of interest found in the Alabama Administrative Procedure Act. Ala. Code § 41-22-18(a). This provision was not even discussed by the Court of Civil Appeals. See Ala. Code § 41-22-18(a).

Because of his close working relationship with his superior, Morgan, McDonald was familiar with the Board's investigation of Dr. Evers even before formal charges were brought. Even after the charges were brought, McDonald and Morgan discussed matters involving Dr. Evers. Morgan remembers having had conversations with McDonald concerning the motion to dismiss filed by Dr. Evers in the case, but is not sure what McDonald knows or does not know about the

case. McDonald admitted that the Board and the Commission work very closely. McDonald also admitted to being involved in discussions with Morgan concerning the federal court case and procedural matters.

In testimony before the trial court, Dr. Leon C. Hamrick, a former member of the Board and presently Chairman of the Medical Licensure Commission, testified that it would be improper for the Commission's hearing officer to have ex parte discussions with the attorney of the prosecuting Board of Medical Examiners. Dr. Hamrick also stated that, in his opinion, any communications between the members of the Board of Medical Examiners and the Medical Licensure Commission regarding a pending charge would be improper in fairness to the party concerned.

The Medical Licensure Commission

The Alabama Medical Licensure Commission ("Commission"), was created in 1981 and is composed of seven physicians. The Medical Licensure Commission is the adjudicating body for charges brought against doctors by the Board of Medical Examiners. The Commission has the power and authority to issue, revoke, and reinstate all medical licenses within the State of Alabama. However, before that Commission may take any action it must, by statute, receive and consider the recommendation of the Board of Medical Examiners. See Ala. Code §§ 34-24-311, -361(h).

All funding, personnel, and facilities utilized by the adjudicating Commission are furnished by the prosecuting Board. Ala. Code § 34-24-312. While the Commission may request a

particular budget, that budget must be submitted to and approved by the Board, which sets the Commission's annual budget. The officers of both the Commission and the Board are located within the same building. These two bodies also share the same in-house attorneys and many of the same employees. All of the members of the Commission, with the exception of perhaps one individual, are members of MASA. Moreover, the liability insurance for the members of the Commission is purchased at the sole discretion of the Board of Medical Examiners.

Court Proceedings

In an effort to enjoin the license revocation proceedings, Dr. Evers filed a three-count complaint in the Circuit Court of Montgomery County, Alabama. The complaint sought a declaratory judgment

that the proceedings were unconstitutionally invalid because the Board and Commission were illegally constituted. The complaint sought to permanently enjoin grounds the license revocation proceedings on due process.

On October 9, 1986, the trial court issued a final judgment "for defendants and against the plaintiff, H. Ray Evers, on all counts of the complaint." Dr. Evers filed a timely appeal to the Court of Civil Appeals of the State of Alabama.

On March 18, 1987, the Court of Appeals of the State of Alabama affirmed the Montgomery County Circuit Court's order of October 9, 1986. After a rehearing was denied, Dr. Evers timely filed a Petition for Writ of Certiorari in the Alabama Supreme Court. That Court granted the petition on July 21,

1987. On December 4, 1987, after briefing and oral argument, the Supreme Court quashed the Petition, without opinion, as improvidently granted. On February 17, 1988, Dr. Evers filed a Notice of Appeal to the United States Supreme Court in the office of the clerk of the Alabama Court of Civil Appeals.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

This case will determine whether a license revocation proceeding violates due process where there exists personal and financial ties between the entity deciding whether to revoke the doctor's license and the entity prosecuting the revocation proceeding. In this case these ties are too numerous and too substantial to permit of a truly unbiased, fair determination. Perhaps

more importantly, this case will determine what "due process" means in the administrative setting.

In an age where administrative bodies, made up of judicial laymen, are more and more called upon to determine liberty and property rights, it is important that this Court review the due process protections which must be accorded by these bodies. Without question the interconnections between the prosecutor and the judge in this case would not be tolerated in a judicial setting. The lower court's decision can be upheld only if "due process" means less when an administrative body decides liberty and property interests than when a judge decides those interests.

The lower court embraced the wrong standard of constitutional review when it held that the constitutionality of this

legislation must be upheld unless proven--beyond a reasonable doubt--to be invalid. Although that is the general rule, the general rule does not apply when the reserved rights, liberties, immunities, and privileges are concerned (i.e., when the inalienable rights of the citizen are involved). City of Mobile v. Bolden, 446 U.S. 55 (1980); Ex parte Rhodes, 202 Ala. 68, 79 So. 462, 464 (1918).

Both this Court in Bolden and the Alabama Supreme Court in Rhodes made it clear that where the fundamental liberty or property rights of an individual are impinged upon by legislation, that legislation is presumed to be unconstitutional. Were the rule otherwise, the constitution would cease to be a bulwark for the protection of the rights of the people against the power of

the state and, indeed, would cease to be fundamental law.

Every person has the inalienable right to engage in any lawful occupation, trade, or calling--even the practice of certain professions or occupations requiring special knowledge or skill, or which intimately affect the public welfare. It is equally well established that the state may not deprive a person of this right without due process of law. Meyer v. Nebraska, 262 U.S. 390 (1923); Shaw v. Hospital Authority, 507 F.2d 625 (5th Cir. 1975); State ex rel. Dally v. Woodall, 225 Ala. 178, 142 So. 838 (1932). Of course, due process must be observed not only by courts, but by all boards and agencies. Wall v. American Optometric Association, Inc., 379 F. Supp. 175 (M.D. Ga. 1974), affirmed, Hardwick v. Wall, 419 U.S. 888 (1974).

A. Due Process is Violated When the Judge Pays the Prosecutor

Continental Telephone Company v. Alabama Public Service Commission, 479 So. 2d 1195 (Ala. 1985), stands for the proposition that a party is denied due process when an adverse party in the administrative hearing has any financial connections with the administrative tribunal. In Continental it was undisputed that the "Governor's public staff" was being paid by the Public Service Commission though under the direction and control of the governor's office. The Supreme Court of Alabama held that this connection between the administrative tribunal and the adverse party was enough to violate Continental's right to a fair hearing. Continental stands for what is, and must be, a basic tenant of federal constitutional process guarantees: that any payment by one

party to an administrative proceeding to the decision-maker per se violates due process.

The entangling financial and personal connections between the Medical Licensure Commission (the judge) and the Board of Medical Examiners (the prosecutor) in this case, go far beyond simply the payment of one's expenses by the other. Here, the prosecutor pays the judge's per diem, travel, and other expenses. The prosecutor pays for and furnishes employees and facilities for the judge. The prosecutor pays the costs and expenses of litigation involving the judge. Finally, the prosecutor pays the judge's attorney. Under the holding in Continental, these financial connections, without more, are enough to deny due process to Dr. Evers.

The lower court, however, distinguished Continental on the basis that the Commission members were paid a per diem of only $100.00 per day. First, this is in error because the other emoluments were not considered by the lower court. But even assuming the Commissioners received nothing but $100.00 per day, can it seriously be argued that due process is not offended if any sum of money--be it $1.00 or $100.00--is paid to a decision-maker by an interested party?

It is respectfully submitted that neither federal constitutional due process guarantees nor the Alabama Supreme Court's decision in Continental, based on the due process clause, depend on the amount of the financial connection between a party and the decision-maker.

B. For the Prosecutor to Pay The Judge is an Even More Blatant Constitutional Violation, Especially In a Disciplinary Proceeding

The Court of Civil Appeals essentially ignored the undisputed facts concerning the connections, both personal and financial, between the Board and the Commission. Unquestionably, it is more blatantly unfair for the prosecutor to pay the judge than for the judge to pay the prosecutor, as in Continental.

This relationship between the Commission and the Board is, we submit, no less constitutionally offensive than if the trial judge in a criminal case were paid his salary and expenses not by the taxpayers, but by the district attorney. As held by the three-judge court in Wall v. American Optometric Association, Inc., 379 F. Supp. 175 (N.D. Ga. 1974), affirmed, Hardwick v. Wall, 419 U.S. 888 (1974), the principles

of due process apply not only to trials, but equally, if not more so, to administrative proceedings. In fact, Wall held that not only must the proceedings be fair, but "the very appearance of complete fairness must also be present". The lower court effectively lowered the due process standard for administrative proceedings in Alabama. However, this proceeding is a quasi-criminal litigation instituted by judicial laymen seeking to end the professional career of another. The Courts must be especially vigilant that due process is strictly accorded in such situations. The Fifth Amendment to the United States Constitution makes no exceptions for the requirement of due process in administrative hearings; due process means "due process".

C. Payment of the Judge by the Prosecutor is Not the Only Constitutionally Offensive Connection

In addition to the Board paying the commission members, there exist the following examples of Commission dependence on the Board (which adds to the unconstitutional pall cast upon the proceedings below).

1. Ex parte communications between the prosecutor and the judge are not only allowed, but required.

Alabama Code sections 34-24-311 and -361(h) require ex parte communications between the prosecutor (the Board) and the judge (the Commission). This requirement is no less constitutionally abhorrent than if a trial judge had been required, before ruling, to hear and consider the recommendations of one of the parties, but not of the other. Horn v. Township of Hilltown, 461 Pa. 745, 748, 337 A. 2d 858, 860 (1975) ("an

attorney representing a party before a tribunal should not be allowed to advise the tribunal during the hearing process"); Pennsylvania Human Relations Commission v. Freeser, 364 A. 2d 1324 (Pa. 1976) (nor should the attorney advise the tribunal during the decisional process).

2. The prosecutor pays for and furnishes all the employees and facilities used by the Commission.

In Alabama, the prosecuting Board furnishes all employees and facilities for the decision-making Commission. It actually shares lawyers, employees, and physical facilities. This state of affairs is no less constitutionally defective than if, in this case, the appellate court and one of the party litigants shared the same suite of offices, law clerks, and secretaries. Moreover, testimony in this case

established that all checks to Commission members and employees came from Board funds. Further, while the Commission may request a particular budget, the budget must be submitted to and approved by the Board, which has the sole discretion over the purse strings. There are no state funds involved in this case. The funds belong to, and are controlled by, the Board. This, Dr. Evers insists, further demonstrates that the disciplinary proceeding is unconstitutional because it denies him due process of law.

3. The prosecutor pays the costs and expenses of litigation involving the judge and may, in its discretion, purchase liability insurance for the judge.

This Court, and all courts, necessarily have immunity for actions taken in the discharge of their duties. If, however, courts did not have this immunity, one can readily see the

potential influence that a party possessing the power to withhold or provide insurance protection might have on the courts. How, then, can due process require less when judicial laymen are called upon to hear and decide a physician's career? At the very least, the appearance of unfairness and judicial dependence would be obvious. Where, as in this case, the prosecutor has control over the provision of liability insurance for decision-makers that are not immune, the potential influence is readily apparent and is enough to render unconstitutional the proceedings against Dr. Evers.

4. The prosecutor pays the per diem, travel, and other expenses of the judge.

As discussed above, the prosecuting Board pays the per diem, travel, and other expenses of the adjudicating

Commission members. These payments alone, Dr. Evers contends, are sufficient to deny Dr. Evers the due process of law to which he is entitled. When it is considered along with all of the other means of influence the Board has upon the Commission members, however, the resulting actual and apparent bias of this required dependence becomes overwhelmingly clear.

5. One of the prosecutor's in-house attorneys is also the chief counsel for the judge.

The evidence revealed that the Board's assistant counsel, Mark McDonald, is also chief counsel for the Commission. During a hearing in federal court, Mr. Morgan, the Board's chief counsel, admitted having discussed Dr. Evers' motion to dismiss the grievance with Mr. McDonald. Under probing questions he stated that he could not remember whether

he spoke to McDonald within or outside the presence of Dr. Evers' attorneys. Mr. McDonald indicated, however, in his deposition that the discussion was actually outside the presence of adverse counsel.

Mr. Morgan's inability to recall whether he had ex parte discussions with his assistant illustrates the ease with which such constitutionally defective communications can take place in the casual and informal atmosphere inherent in an employer-employee situation and where the same offices and secretaries are used. When an individual wears many hats, its stretches the limits of human ability to expect him to remember at all times which hat he is wearing.

In State Board of Medical Education & Licensure v. Grumbles, 347 A.2d 782 (Pa.Appl975), the Pennsylvania court held

that where one attorney represents a party before a tribunal and another attorney from the same office or department advises the tribunal, the right to a fair trial is impaired. This principle of law has been embraced by the Alabama Supreme Court in City of Huntsville v. Biles, 489 So. 2d 509 (Ala. 1986). Clearly, this improper relationship is present in this case and requires that the proceedings be enjoined as unconstitutionally violative of Dr. Evers' due process rights.

It is clear, furthermore, that the Alabama Court of Civil Appeals ignored Alabama statutory law, which provides:

> No individual who participates in the making of any proposed order or final decision in a contested case shall have prosecuted or represented a party in connection with that case, the specific controversy underlying that case, or another pending factually related contested case, or pending factually related

> controversy that may culminate in a contested case involving the same parties. Nor shall any such individual be subject to the authority, direction or discretion of any person who has prosecuted or advocated in connection with that contested case, the specific controversy underlying that contested case, or a pending factually related contested case or controversy, involving the same parties.

Ala. Code § 41-22-18(a).

It is respectfully submitted that this violation establishes prejudice and denial of due process as a matter of law. No other result is logically possible. Only if the constitutional rights of an individual may be accorded less due process in an administrative hearing than in the courts of this land can the lower court's decision be defended. If anything, an individual in an administrative proceeding, adjudicated by judicial laymen unfamiliar and untrained in the niceties of

constitutional theory, should be protected by enhanced standards of "due process". However, at a minimum, Dr. Evers must be accorded no less protection than the most common criminal would receive in the courts. Due process requires no less.

6. Both the attorney for the prosecutor and the attorney for the judge are paid out of the same pocket.

Mr. Morgan's testimony illustrated the opportunity for improper influence and abuse when he testified that at least a portion of his salary and expenses were borne by the Board (the prosecutor), which also pays the salary and expenses of his assistant counsel, Mr. McDonald (counsel for the Commission). Mr. McDonald has also served as the hearing officer in the case against Dr. Evers. Dr. Evers submits that the influence of a legal officer on these quasi-criminal

proceedings brought by and presided over by laymen cannot be over-emphasized. Though McDonald later stepped down as hearing officer it was too late to cure the infection. Moreover, he continued to serve as chief counsel to the Commission. This, Dr. Evers submits, must constitute a violation of due process. See State Board of Medical Examiners & Licensure v. Grumbles, 347 A.2d 782 (Pa. App. 1975); Wall v. American Optometric Association, Inc., 379 F. Supp. 175 (M.D. Ga.), affirmed, Hardwick v. Wall, 419 U.S. 888 (1974):

> The right to due process of law is not merely to have one's case heard by an impartial tribunal "in the first instance." ... The process of decision must be impartial in every instances and in every respect. Just as a chain is only [as] strong as its weakest link, a decision-making process is only as fair as its most biased component. In this case, that component is the Board. The role which the Board must inevitably play in

> the process is sufficient to infect the process with substantial unfairness.

By dismissing Mr. McDonald as hearing examiner, the defendants in this case recognized that due process had been violated. Their attempt to cure but one small portion of the problem was too little and came too late to secure due process to Dr. Evers.

It is apparent from even a cursory review of the applicable statutes, testimony, and exhibits offered that Dr. Evers' rights to due process cannot exist in the communal atmosphere inherent in the close relationship between the Board and the Commission in this case. This is not in any way excused by the good intentions expressed by some of the Board and Commission members. The fifth amendment states that no person shall be "deprived of life, liberty or property,

without due process of law". No exception to that amendment can permit a denial of due process when the individuals taking the liberty or property have good intentions or are, as the lower court held, "honorable men".

D. The Cumulative Impact of The Commission's Dependence on The Board

Even if this Court finds that no single relationship rendered these proceedings unconstitutional, Dr. Evers submits that the cumulative effect of these interrelationships doom the proceedings against Dr. Evers.

E. The Proceedings Must Be Enjoined Under The Authority of Gibson v. Berryhill

The lower court apparently did not even consider Dr. Evers' argument that Gibson v. Berryhill, 411 U.S. 564 (1973) controls this case. Berryhill arose out of the Middle District of Alabama.

There, the Alabama Optometric Association, which excluded from membership all corporate-employed optometrists, filed charges with the Alabama State Board of Optometry against individuals employed by Lee Optical Company. These charges sought revocation of their licenses. The Alabama Board of Optometry was composed exclusively of members of the Optometric Association. Thereafter, the Board of Optometry itself brought a state court action against Lee Optical Company seeking to enjoin that company from the unlawful practice of optometry. The Lee Optical optometrists brought suit in federal court under section 1983 seeking to enjoin the license revocation hearings on the ground that the Board could not provide a hearing affording them proper measures of due process.

A three-judge federal court enjoined the Board from conducting the hearings and from revoking the optometrists' licenses because of the possible bias of the Board in both the prejudgment of the facts and in the personal interest of the board members in the outcome of the case. The District Court held that because the Board of Optometry was composed solely of optometrists in private practice for their own account, success in the Board's efforts to revoke the licenses of the Lee Optical optometrists would possibly rebound to the personal benefit of members of the Board. This disqualified such members from hearing the charges. Moreover, the District Court found that because the Board had, in effect, been both the prosecutor and judge, it was so biased by prejudgment that it could not

constitutionally conduct revocation hearings.

On direct appeal, this Honorable Court remanded for reconsideration in light of an intervening Alabama judgment, but, nevertheless, found that the District Court was correct in disqualifying the members of the Board on the basis of bias.

In this case, MASA has the unfettered and sole discretion to chose the members of the Board. The Board members are chosen solely from members of that private medical association, an organization to which Dr. Evers does not belong and to which he would not be allowed to join. Moreover, Dr. Evers' affidavit indicates that he is unwilling to join that association because of its espousal and monetary support of political causes to which he does not

subscribe. Dr. Evers simply cannot be compelled to give up his First Amendment rights in order to obtain the due process to which he is entitled under the Fifth Amendment. NAACP v. Alabama, 357 U.S. 449 (1958).

Alabama law effectively makes the Commission the body that decides charges prosecuted by the Board of Medical Examiners. From outward appearances, it would appear that there is a separate prosecutor and judge; however, the true facts show that these bodies are so interrelated that both sources of possible bias present in Berryhill are present here and require the disqualification of Board members.

First, the opportunities for prejudgment are clear whether or not prejudgment has taken place. It must be reiterated that Berryhill found that only

the possibility of prejudgment of the facts was necessary to infect the proceedings. Here, prejudgment is not simply possible, but is probable. And second, because Dr. Evers is not a member of MASA and would be denied membership even if he wished to join the association, the other possible source of bias present in Berryhill--personal interest--is also present: the Commission's revocation of Dr. Evers' license worked to the benefit of other practicing physicians. Dr. Evers' treatment also sends a chilling message to those medical doctors who are not members of the medical association.

It must be reiterated that Dr. Evers need not prove actual bias in order to prove that his due process rights were offended. It is only necessary for him to show possible bias, or the appearance

of bias. Such bias is irrefutably present in this case. See Friedman v. Rogers, 440 U.S. 1 (1979); In re Murchison, 349 U.S. 133 (1955); Wall v. American Optometric Association, 379 F. Supp. 175 (M.D. Ga. 1974), affirmed, Hardwick v. Wall, 419 U.S. 888 (1974).

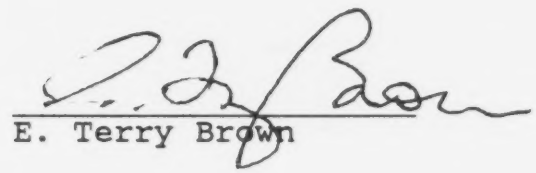
In summary, the teachings of Berryhill and other Supreme Court cases which have considered such matters as this have made clear that the very appearance of complete fairness must be present in order to satisfy the due process rights of a non-member of the prosecuting organization. This should especially be true where judicial laymen, unfamiliar and unschooled in legal and constitutional principles, are the arbitrators of the liberty and property interests of other citizens. Because it is clear in this case that, complete

fairness is not present, Dr. Evers did not receive due process of law, and the prosecution should have been enjoined.

CONCLUSION

Appellant raises substantial challenges to the constitutional validity of state laws that deprive Appellant of his property without due process of law. As shown, the issues are substantial, and warrant review by this Court.

Appellant prays that this Court require briefs of the parties and that it grant oral argument and enter a decision reversing the Alabama Court of Civil Appeals.



E. Terry Brown

OF COUNSEL:
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& Gill, P.A.
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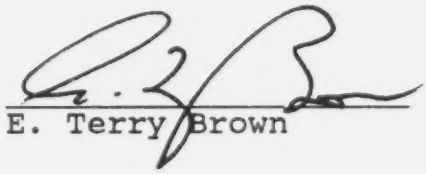
CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document has been served upon Robert Huffaker, RUSHTON, STAKELY, JOHNSTON & GARRETT, P. O. Box 270, Montgomery, Alabama, 36195, and Wendell Morgan, P. O. Box 1900-C, Montgomery, Alabama, 36197, by placing a copy of same in the United States Mail, postage prepaid and properly addressed this the 25th day of February, 1988.



E. Terry Brown

APPENDIX

March 18, 1987

STATE OF ALABAMA --- JUDICIAL DEPARTMENT

THE COURT OF CIVIL APPEALS

OCTOBER TERM 1986-87

Civ. 5621

H. Ray Evers, M.D.

v.

The Board of Medical Examiners, et al.

Appeal from Montgomery Circuit Court

BRADLEY, Presiding Judge

This is an appeal from an order of the Circuit Court of Montgomery County, Alabama denying certain declaratory and injunctive relief sought by the plaintiff, Dr. Ray Evers.

Dr. Evers operates a cancer clinic in Cottonwood, Alabama. The record indicates that Evers employed a cancer treatment technique known as an "herbal tumor removal" system which involved the application of certain salves and the prescription of certain vitamins which were designed to stimulate the body's immune system. The treatment also involved the application of a black salve which was designed to burn the patient's skin in an area infected by cancer. The skin was then treated with a yellow salve which was designed to heal the burned skin and cause the cancerous tumor in the patient's body to rise to the skin's surface where it could be removed. Additionally, Evers's herbal tumor removal system required the prescription of vitamins and the administration of enemas containing

dimethyl sufoxide (DMSO), an industrial solvent.

In the latter part of 1984 Mrs. Maxie L. Walker decided to consult the medical authorities about a lump in her right breast. She was advised to undergo surgery and chemotherapy. She did not heed this advice but instead consulted Dr. Evers. Mrs. Walker entered the Evers Clinic in April 1985. During her treatment at the Evers Clinic, Mrs. Walker sustained burns to the right side of her upper torso. Mrs. Walker was admitted to Flowers Hospital the latter part of April 1985 for treatment of these burns. She subsequently died as a result of these injuries.

A complaint was filed with the State Board of Medical Examiners against Dr. Evers. After an investigation the Board filed a complaint with the State

Medical Licensure Commission against Dr. Evers.

Before the Commission could hold a hearing to determine the validity of the complaint filed against him, Dr. Evers filed a complaint in the Circuit Court of Montgomery County against the Board, the Commission, and the individual members of each of these organizations. Dr. Evers sought declaratory as well as injunctive relief to prevent the Board from instituting or proceeding with disciplinary actions against him before the Commission.

After a hearing the circuit court denied Evers's request for relief and he appealed to this court.

Evers asserts that the circuit court erred in refusing to enjoin the proceedings commenced against him before the Commission. In brief Evers attacks the constitutionality of three provisions

of Alabama's medical licensing and disciplinary procedure. First, Evers asserts that section 34-24-54 of the Alabama Code is violative of constitutional due process because of the financial arrangements between the Board and the Commission. Evers also argues that various other provisions create certain conflicts of interest which violate constitutional due process. Second, Evers argues that the appointment powers delegated to the Board by the Alabama Legislature constitute an unconstitutional delegation of legislative authority. Finally, Evers contends that the so-called no-stay provision of section 34-24-367 is unconstitutional.

I. Procedural Due Process

A. Financial Arrangement between the Board and the Commission

Evers's first contention on appeal is that the close financial

relationship between the Board and the Commission constitutes a procedural due process violation. Evers argues in brief that the current arrangement between the two is analogous to the type of conflict which would arise in a situation wherein a prosecutor who practices before a certain tribunal compensates the members of that tribunal.

At this point we note that the Board is the investigative and prosecutorial arm of the state's medical profession. See, §§ 34-24-36, -53, -56, -57, Code 1975. The Commission, on the other hand, constitutes the adjudicative arm of the profession, and has the exclusive authority to revoke the licenses of physicians who are guilty of professional misconduct. See, §§ 34-24-210, -311, Code 1975.

In support of his argument that the financial relationship between the

Board and the Commission is violative of due process, Evers cites Continental Telephone Co. v. Alabama Public Service Commission, 479 So. 2d 1195 (Ala. 1985). The Continental Telephone Co. case, however, can be distinguished from the facts in the present case. Continental Telephone involved a hearing before the Public Service Commission regarding a proposed rate increase by a public utility. An organization known as the Public Staff for Utility Consumer Protection attempted to intervene and the intervention was granted. After the Public Service Commission granted only part of the rate increase sought by Continental Telephone Company, Continental and the Public Staff appealed.

On appeal Continental argued that its due process rights were violated because the Public Staff was nothing more

than a group of Public Service Commission staff members who had been placed "on loan" to the Governor's Office. The Alabama Supreme Court held that Continental's due process rights were violated because the Public Staff was nothing more than an integral part of the Commission's trial staff under a different label. Thus, the potential for prejudice which existed created a due process violation in and of itself.

The relationship between the Board and the Commission in the present case, however, is much more remote than that of the Public Service Commission and the Public Staff in the Continental case. First, the members of the Board are appointed by the Medical Association of the State of Alabama (hereinafter MASA), while members of the Commission are appointed by the lieutenant governor, the speaker of the house, and the governor.

See, §§ 34-24-53, -310, Code 1975. Second, while both organizations are funded by proceeds from the issuance of licenses, these proceeds are deposited into a joint account, and each organization establishes its own budget, keeps its own set of books, and uses the joint account to defray expenses incurred. See, §§ 34-24-53(b), -54, Code 1975. Finally, the entire amount of compensation received by Board members and Commission members is only $100 per day for days in which they attend official meetings. See, 34-24-54, Code 1975. Thus, the respective members of the Board and the Commission, who are licensed, practicing physicians, are far less financially dependent on their compensation than members of the Public Staff in Continental Telephone. Moreover, the employer-employee relationship that was present in

Continental is not present in the instant case.

We recognize that a fair trial before an impartial tribunal or administrative agency is a basic requirement of due process. Gibson v. Berryhill, 411 So. 2d 564 (Ala. 1975); In re Murchison, 349 U.S. 133 (1955). However, it is this court's duty to sustain the constitutionality of legislative enactments involving the State's police power unless those enactments are proven beyond a reasonable doubt to be constitutionally invalid. Crosslin v. City of Muscle Shoals, 436 So. 2d 862 (Ala. 1983). We find that Evers has failed to prove that the financial relationship between the Board and the Commission poses any real threat to his due process rights. Thus, we affirm this aspect of the trial court's order.

B. Conflicts Arising out of the Combination of Prosecutorial and Adjudicative Functions

Evers also asserts that various conflicts of interest exist between Commission members and Board members. Evers says that the fact that the Commission and the Board are housed in the same facilities, as well as the fact that the Board's assistant general counsel serves as the Commission's general counsel, gives rise to a conflict which is violative of due process.

As previously stated, the record reveals that the general counsel for the Board serves as the prosecutor for the Board before the Commission and the assistant general counsel for the Board serves as hearing officer for the Commission. The Commission's hearing officer, however, is neither empowered nor authorized to vote in license revocation cases, and the seven members

of the Commission, all of whom are physicians, bear sole responsibility for determining whether a physician's license should be revoked. See, § 34-24-11, Code 1975.

Evers also argues, however, that potential due process violations exist because of conflicts of interest which exist between the Board's general counsel, Wendell Morgan, and the Board's assistant general counsel, Mark McDonald. As previously stated, the Board's general counsel serves as the legal advisor to the Board as well as the prosecutor in license revocation cases before the Commission. Additionally, the Board's assistant general counsel, Mark McDonald, serves as the legal advisor to the Commission as well as the hearing officer in matters before the Commission.

Our review of the record, as well as case law in other jurisdictions,

however, indicates that no unconstitutional conflict of interest exists in the present case. The evidence reveals that while Mr. McDonald and Mr. Morgan share many common duties in their respective capacities Mr. McDonald is an employee of the Commission and answers directly to the chairman of the Commission, Dr. Leon Hamrick. Conversely, Mr. Morgan, the Board's general counsel, answers to the Board of Medical Examiners and MASA. The evidence also reveals that before being hired Mr. McDonald was interviewed by Mr. Morgan, the credentials committee of the Board, and the Commission. Thus, even though Mr. McDonald's duties include his service as the Board's assistant general counsel, he was neither hired directly by the Board nor is he always answerable to the Board. For these reasons, Evers's claim that the financial relationship

between Mr. McDonald, Mr. Morgan, the Board, and the Commission creates a conflict of interest violative of due process is not supported by the evidence.

Therefore, based upon our review of the record in the present case, we are unable to say that Evers has offered sufficient proof to overcome the presumption that the Board's general counsel and assistant general counsel as well as those physicians serving as adjudicators on the Commission are men of honesty and integrity who are not susceptible to being swayed by potential conflicts which may exist. Withrow v. Larkin, 421 U.S. 35 (1975); see also, Winslow v. Department of Professional & Occupational Regulation, 348 So. 2d 352 (Fla. Dist. Ct. App. 1977). Since Evers has failed to prove that his procedural due process rights were violated in this

case, we find that the formation and compensation schemes of the Board and the Commission do not offend due process.

II. Delegation of Appointment Power to MASA

Evers's next contention is that section 34-24-53 constitutes an unconstitutional delegation of legislative authority to a private organization, MASA.

The statute in question provides in pertinent part:

> "The board of censors of the Medical Association of the state of Alabama, as constituted under the laws now in force, or which may hereafter be in force, and under the constitution of said association, as said constitution now exists or may hereafter exist, is constituted the state board of medical examiners and is charged with the duties and clothed with the powers hereinafter prescribed; said board is hereby vested with authority to adopt and promulgate rules and regulations and to do such other acts as may be necessary to carry into effect the duties and powers which accrue to it

> under laws now in force or which may hereafter be in force; and a quorum as provided for by the constitution of the Medical Association of the state of Alabama shall be competent to act."

§ 34-24-53(a), Code 1975 (emphasis ours).

As previously stated, Evers argues that section 34-24-53(a) violates Article IV, Section 44 of the Alabama Constitution by delegating appointment power to MASA and by delegating to MASA the power to decide the number of members on the Board as well as what shall constitute a quorum. The Board, on the other hand, argues that the provision is not constitutionally offensive because it is rationally related to a legitimate State purpose and because sufficient legislative safeguards exist.

It is a fundamental rule of constitutional law that the lawmaking

authority of the legislature may not be delegated to any other department or agency, either public or private. State v. Vaughan, 30 Ala. App. 201, 4 So. 2d 5 (Ala. Ct. App. 1941). Therefore, when certain legislative powers are delegated to administrative or quasi-administrative officials, it is a prerequisite that adequate standards be established by the legislature so that officials to whom the powers are delegated will not legislate but, rather, will carry out the legislative will. See, Commission on Medical Discipline v. Stillman, 291 Md. 390, 435 A.2d 747 (1981). In the realm of public health, however, administrative officials are permitted more control, and, thus, less strict legislative guidelines are required. Commission on Medical Discipline v. Stillman, supra.

Article IV, Section 44 of the Alabama Constitution precludes the legislature from delegating its lawmaking authority to MASA; however, this does not mean that the legislature is precluded from delegating any authority to MASA. See, Yielding v. State, 232 Ala. 292, 167 So. 580 (1936). Indeed, Alabama courts have consistently held that the legislative delegation of appointment power it could have itself exercised does not constitute an unconstitutional delegation of lawmaking power. Yielding v. State, supra; see also, In re Opinion of the Justices, 252 Ala. 559, 42 So. 2d 56 (1949); Parke v. Bradley, 204 Ala. 455, 86 So. 28 (1920).

In the present case the legislature created the Board and provided that its membership will be composed of the members of the Board of

Censors who, in turn, are selected by the Medical Association of Alabama. Pursuant to its constitutional authority, the legislature could have prescribed a different appointment procedure, for example, authorizing the governor and other governmental officers to name the members of the Board. However it chose to repose the appointment power in a quasi-administrative body--the Medical Association of Alabama. See, Parke v. Bradley, supra. We find no constitutional impediment to this delegation of appointment power.

Evers also contends that the provisions of section 34-24-53(a) amount to an unconstitutional delegation of legislative authority because the statute allows MASA to determine what comprises a quorum for purposes of Board meetings. Evers contends that the delegation of

authority to MASA is unconstitutional because the statute allows MASA to regulate future Board membership via its constitution.

As a general rule, the legislature may delegate to its own appointed administrative agencies the authority to make such minor rules and regulations as are necessary or appropriate for administration or enforcement of its general statues. State v. State Board of Medical Examiners, 209 Ala. 9, 95 So. 295 (1923). Section 34-24-53(a) specifically provides that, in addition to regulation by MASA's constitution, the Board shall also be "constituted under the laws now in force, or which may hereafter be in force." § 34-24-53(a), Code 1975. Additionally, the statute in question vests the Board "with authority to adopt and promulgate

rules and regulations and to do such other acts as may be necessary to carry into effect the duties and powers which accrue under the laws now in force or which may hereafter be in force." § 34-24-53(a), Code 1975.

A state has broad power to establish and enforce standards of conduct within its borders relative to the health of its citizens. See, Stephens v. Dennis, 293 F. Supp. 589 (N.D. Ala. 1968). In our opinion, the legislature has not exceeded its authority by delegating certain powers to MASA and the Board because the legislature provided sufficient standards in the statute in question by which MASA and the Board must be governed. Admittedly, the statute in question establishes MASA's power to appoint the Board members under present and future

laws of the state as well as under MASA's constitution. The statute, however, then empowers the Board to adopt rules which are necessary to carry current and future legislation into effect, and subrogates MASA's authority to that of the legislature by stating that the Board's composition shall be subject to existing as well as future legislation. See, § 34-24-53(a), Code 1975.

Because sufficient guidelines are established to serve as benchmarks for MASA's board appointments, that appointment power is not constitutionally offensive. Additionally, because section 34-24-53(a) sets legislative guidelines for the Board to follow, it is also nonviolative of Article IV, Section 44 of the Alabama Constitution.

III No-Stay Provision

Section 34-24-367 provides, in pertinent part:

> "Any order of the medical licensure commission suspending or revoking a license to practice medicine or osteopathy shall have immediate effect and shall not be stayed or held in abeyance by any court."

§ 34-24-367, Code 1975.

Evers asserts that the so-called "no-stay provision" of section 34-24-367 violates both the due process clause of the United States Constitution as well as various similar provisions of the Alabama Constitution.

We note, however, that section 34-24-367 applies only to Commission orders actually revoking or suspending a physician's license. The controversy in the present case merely involves Evers's attempt to obtain declaratory and injunctive relief to prevent the

Commission from ever hearing the Board's complaint against him.

As a general rule, injunctive and declaratory remedies, such as those sought in the present case, lie within the discretion of the judiciary. Moreover, the courts are reluctant to allow such relief against administrative determinations unless those remedies arise in a context ripe for judicial determination. See, Abbott Laboratories v. Gardner, 387 U.S. 136 (1967).

The statute as well as the facts in the present case reveal that Evers's ability to obtain injunctive relief was not yet infringed upon by section 34-24-367. Furthermore, section 34-24-367 does not apply until the Commission has actually issued an order denying or revoking a physician's license. Thus, Evers's constitutional

challenge of the no-stay provision is not ripe for adjudication at this time. Should the Commission actually issue such an order revoking or suspending Evers's license to practice medicine, this issue will then be ripe for determination pending Evers's appeal from the circuit court.

We, therefore, refuse to address the issue of Evers's constitutional challenge to the no-stay provision in question.

IV. Conclusion

The briefs and record before us indicate that the relationship between the Board and the Commission is not so inseparable as to violate due process. Additionally, the statutory provisions in question do not constitute an unconstitutional delegation of authority under Article IV, Section 44 of the

Alabama Constitution. Finally, Evers's constitutional attack on the no-stay provision of section 34-24-367 is not yet ripe for adjudication, and, therefore, we refuse to address it at this time.

For the foregoing reasons, we affirm the circuit court's judgment denying the declaratory and injunctive relief sought by Evers.

AFFIRMED.

Holmes and Ingram, JJ., concur.

IN THE CIRCUIT COURT OF
MONTGOMERY COUNTY, ALABAMA

H. RAY EVERS, M.D.,	*	
Plaintiff,	*	
vs.	*	CASE NO. CV-86-874-K
THE BOARD OF MEDICAL EXAMINERS, et al.,	*	
Defendants.	*	

JUDGMENT

On the basis of the evidence and law presented, it is ORDERED that judgment be, and the same hereby is, entered for defendants and against the plaintiff, H. Ray Evers, on all counts of the complaint. Costs are taxed to the plaintiff.

Done this the 9th day of October, 1986.

/Signature
H. MARK KENNEDY
Circuit Judge

cc: C. Stakely/R. Huffaker
J. Henig/T. Brown/R. Segall

OFFICE OF
CLERK OF THE COURT OF CIVIL APPEALS
STATE OF ALABAMA
MONTGOMERY

RE: CIV. 5621 April 22, 1987
H. Ray Evers, Appellant vs. The Board of Medical Examiners, et al., Appellee.

You are hereby notified that the following indicated action was taken in the above cause by the Court of Civil Appeals:

_____ Court Reporter granted additional time to file reporter's transcript to and including

_____ Clerk/Register granted additional time to file clerk's record/record on appeal to and including

_____ Appell_____granted 7 additional days to file brief(s) to and including

_____ Appellant(s) granted 7 additional days to file reply brief(s) to and including

_____ Record on Appeal filed on this date.

_____ Appendix Filed on this date.

_____ Submitted on Briefs

XXX Application for rehearing overruled. No opinion written on rehearing.

_____ Permission to file amicus curiae briefs granted

_____ Rules suspended

_____ Transferred to the Supreme Court for lack of jurisdiction. A/N

_____

MAILING ADDRESS:
2600 East South
Blvd., Room 250
Montgomery, AL
36116

/Signature
JOHN H. WILKERSON,
JR., Clerk,
Court of Civil
Appeals of Alabama

MAILING ADDRESS: TELEPHONE: 261-4609
P. O. Box 157
Montgomery, Alabama
36101

OFFICE OF
CLERK OF THE SUPREME COURT
STATE OF ALABAMA
MONTGOMERY

RE: 86-1020

EX PARTE: H. RAY EVERS, M.D. PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS
(H. Ray Evers, Appellant vs. Board of Medical Examiners, et al., Appellee)

You are hereby notified that the following indicated action was taken in the above cause by the Supreme Court today:

_____ Appeal docketed. Future correspondence should refer to the above number.

_____ Court Reporter granted additional time to file reporter's transcript to and including

_____ Clerk/Register granted additional time to file clerk's record/record on appeal to and including

_____ Appell_____granted 7 additional days to file briefs to and including

_____ Appellant(s) granted 7 additional days to file reply briefs to and including

_____ Record on Appeal filed

_____ Appendix Filed

_____ Submitted on Briefs

_____ Petition for Writ of Certiorari denied. No opinion.

_____ Application for rehearing overruled. No opinion written on rehearing.

_____ Permission to file amicus curiae briefs granted

XXXX Petition for Writ of Certiorari to the Court of Civil Appeals granted.

PER CURIAM
TORBERT, CJ., JONES, SHORES, ADAMS AND STEAGALL, JJ., CONCUR.

Attorneys should consult Rule 39(f) and (h), ARAP, regarding the filing of additional briefs and oral argument.

PLEASE USE ABOVE NUMBER ON ALL MATERIAL FILED IN THIS CASE.

7/21/87
bsa

/Signature
Robert G. Esdale
Clerk, Supreme Court
of Alabama

December 4, 1987

THE STATE OF - - - - JUDICIAL DEPARTMENT
ALABAMA

IN THE SUPREME COURT OF ALABAMA

86-1020

EX PARTE: H. RAY EVERS, M.D.
PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS (Re: H. Ray Evers v. The Board of Medical Examiners, et al.)

WHEREAS, on July 21, 1987, a Writ of Certiorari to the Court of Civil Appeals was granted by this Court, and the cause was set down for submission pursuant to Rule 39, Alabama Rules of Appellate Procedure.

WHEREUPON, come the parties and the Petition for Writ of Certiorari being submitted and duly examined and understood by the Court, it is considered by the Court that the writ heretofore issued should be quashed and that the petition should be denied.

IT IS, THEREFORE, CONSIDERED AND ORDERED that the Writ of Certiorari heretofore issued to the Court of Civil Appeals be, and the same is hereby, quashed, and the Petition for Writ of Certiorari be, and the same is hereby, denied, at the costs of petitioner, for which let execusion issue.

NO OPINION

PER CURIAM - TORBERT, C.J., JONES, SHORES, BEATTY, ADAMS, HOUSTON AND STEAGALL, JJ., CONCUR; MADDOX, J., RECUSES.

I, Robert G. Esdale, as Clerk of the Supreme Court of Alabama, do hereby certify that the foregoing is a full, true and correct copy of the instrument(s) herewith set out as same appear(s) of record in said Court. Witness my hand this 19 day of Feb. 1988.

/Signature
Clerk, Supreme Court
of Alabama

IN THE COURT OF CIVIL APPEALS OF ALABAMA

H. RAY EVERS, M.D.,	*	
Appellant,	*	
vs.	*	CASE NO. CIV 5621
THE BOARD OF MEDICAL EXAMINERS, et al.,	*	
Appellees.	*	

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that H. Ray Evers, M.D., the appellant above named, hereby appeals to the Supreme Court of the United States from the final order of the Alabama Court of Civil Appeals, entered herein on March 18, 1987, made the final order of the highest court of the state by virtue of the order of the Supreme Court of Alabama quashing the Petition for Writ of Certiorari to the

Court of Civil Appeals, entered herein on December 4, 1987.

This appeal is taken pursuant to 28 U.S.C. § 1257(2).

E. Terry Brown
Attorney for H. Ray Evers, M.D.,
Appellant

OF COUNSEL:
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Post Office Box 347
Montgomery, Alabama 36101-0347
(205) 834-1180

§ 1257. State courts; appeal; certiorari

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

(1) By appeal, where is drawn in question the validity of a treaty or statute of the United States and the decision is against its validity.

(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.

(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its

being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.

For the purposes of this section, the term "highest court of a State" includes the District of Columbia Court of Appeals.

§ 34-24-53. Board of medical examiners - Powers and duties generally; rules and regulations; quorum; fund to defray litigation costs.

(a) The board of censors of the Medical Association of the state of Alabama, as constituted under the laws now in force, or which may hereafter be in force, and under the constitution of said association, as said constitution now exists or may hereafter exist, is constituted the state board of medical examiners and is charged with the duties and clothed with the powers hereinafter prescribed; said board is hereby vested with authority to adopt and promulgate rules and regulations and to do such other acts as may be necessary to carry into effect the duties and powers which accrue to it under laws now in force or

which may hereafter be in force; and a quorum as provided for by the constitution of the Medical Association of the state of Alabama shall be competent to act.

(b) The board is hereby specifically authorized to set aside from its general revenues and income a special fund designated to defray the fees, costs and expenses of litigation involving the board and its members or staff, and the commission and its members and staff, arising out of the lawful discharge of the duties and obligations of the board or commission. A portion of the special fund so designated may be expended to purchase liability insurance for the members of the board, its officers, executives and attorneys and for members of the commission and its officers, executives and attorneys.

§ 34-24-54. Same - Deposit and expenditure of funds received; expenses of board and commission members.

All funds received by the state board of medical examiners shall be deposited to the credit of the board in a federally insured financial institution selected by the board. Such funds may be expended for any lawful purpose authorized by this chapter upon a check or draft bearing the signature of the chairman of the board. Out of the funds of the board the members thereof and the members of the medical licensure commission as established by section 34-24-310 shall receive per diem at a rate of $100.00 per day or any portion thereof that such board member or commission member shall be in attendance at an official meeting or function of the board or commission. In addition, each board

member and commission member shall receive reimbursement for subsistence and travel in accordance with state law for each day actively engaged in the duties of their office.

§ 34-24-311. General authority.

The above constituted commission shall have the exclusive power and authority to issue, revoke and reinstate all licenses authorizing the licensee to practice medicine or osteopathy in the state of Alabama. The commission shall have the authority to promulgate such reasonable rules and regulations as it deems proper for implementing and carrying out the provisions of this article. However, prior to exercising its power and authority to issue, revoke or reinstate licenses, or to promulgate rules and regulations, the medical licensure commission shall receive and consider but not be bound by the recommendation of the state board of medical examiners.

§ 34-24-312. State board of medical examiners to furnish facilities, receive funds, etc.

All personnel and facilities necessary to administer and enforce this article shall be furnished by the state board of medical examiners. All money, funds, fees, charges, and other receipts provided for in this article shall be paid to the state board of medical examiners and used by said board to carry out the provisions of this article.

§ 34-24-361. Investigations; reporting offenses; formal interview; procedure for hearings; temporary suspension;voluntary restrictions; actions to be taken by commission.

(a) The state board of medical examiners on its own motion may investigate any evidence which appears to show that a physician or osteopath holding a certificate of qualification to practice medicine or osteopathy in the state of Alabama is or may be guilty of any of the acts, offenses, or conditions set out in section 34-24-360.

(b) Any physician or osteopath holding a certificate of qualification to practice medicine or osteopathy in the state of Alabama shall and is hereby required to, and any other person may, report to the board or the commission any information such physician, osteopath or other person may have which appears to

show that any physician or osteopath holding a certificate of qualification to practice medicine or osteopathy in the state of Alabama may be guilty of any of the acts, offenses or conditions set out in section 34-24-360, and any physician, osteopath or other person who in good faith makes such a report to the board or to the commission shall not be liable to any person for any statement or opinion made in such report.

(c) If in the opinion of the board it appears that such information provided to it under the provisions of this section may be true, the board may request a formal interview with the physician or osteopath.

(d) If the physician or osteopath invited to a formal interview before the board refuses to appear for such interview, the commission shall have

grounds to suspend or revoke the certificate of qualification of such physician or osteopath.

(e) Any proceeding for suspension or revocation of a license to practice medicine or osteopathy in the state of Alabama shall be conducted in accord with the following procedures:

(1) A written complaint signed by any member of the state board of medical examiners, any duly licensed physician or osteopath, the executive officers of the commission, or any other person shall be filed with the medical licensure commission.

(2) The executive officer of the commission shall set a date for the hearing of said complaint, shall notify the physician or osteopath against whom the complaint was filed of the time and place of said hearing and shall forward

to such physician or osteopath a copy of the complaint filed against him.

(3) Such notice shall be served upon the physician or osteopath against whom the complaint was filed at least 20 days prior to the hearing date.

(4) Said notice may be served by any sheriff of the state of Alabama or by any person designated by the executive officer of the commission, and if served by a person designated by the executive officer, the return of service shall be sworn to by said person before some officer authorized to administer oaths.

(5) If the physician or osteopath against whom a complaint has been filed is out of the state, or evades service, or cannot be served in person, then the service shall be made by mailing a copy of the complaint and of the notice to said person at his last known post

office address in this state, and the return shall show that service has been made in this manner.

(6) The investigation shall be held with as little publicity as practicable, consistent with a fair and impartial hearing, but the physician or osteopath against whom the complaint has been filed may elect to have the hearing in public.

(7) At the hearing the physician or osteopath against whom the complaint has been filed shall have the right to be represented by counsel and shall have the right to call any witnesses germane to the issues under consideration.

(8) The commission may permit the complaint to be amended but no amendments shall be permitted that are not germane to the acts, offenses or

conditions originally charged or that materially alters the nature of any act, offense or condition charged.

(9) The commission shall have the right to determine all questions as to the sufficiency of the complaint, as to procedure and as to the admissibility and weight of evidence.

(10) If a person whose qualifications are under consideration absents himself, or does not appear after having been given the required notice, the hearing may proceed in his absence.

(f) The commission shall, temporarily, suspend the license of a physician or osteopath without a hearing simultaneously with the institution of proceedings for a hearing provided under this section on the request of the state board of medical examiners if the board finds that evidence in its possession

indicates that the physician's or osteopath's continuation in practice may constitute an immediate danger to his patients or to the public.

(g) A physician or osteopath may surrender his certificate of qualification or request in writing to the state board of medical examiners that a restriction be placed upon his certificate of qualification to practice medicine or osteopathy. The board may accept a surrender or grant such a request for restriction and shall have the authority, if it deems appropriate, to attach such restrictions to the certificate of qualification of the physician or osteopath to practice medicine or osteopathy within the state of Alabama. Removal of a voluntary restriction on a certificate of qualification shall be done only with the

approval of the state board of medical examiners. If the board accepts the surrender of a certificate of qualification, it shall notify the commission and the commission shall withdraw the physician's or osteopath's license to practice medicine or osteopathy in the state of Alabama. If the board attaches restrictions to a physician's or osteopath's certificate of qualification, it shall notify the commission of the restrictions and the commission shall also place the restrictions on the physician's or osteopath's license to practice medicine or osteopathy in the state of Alabama. If the board denies a request by an applicant for reinstatement of his certificate of qualification or for removal of a voluntary restriction, the applicant shall have the right of appeal

to the commission which has the authority to either affirm the board's action or order the board to modify its action as the commission deems appropriate.

(h) Subsequent to the holding of a hearing and the taking of evidence by the commission as provided for in this section, the commission shall request and consider but not be bound by a recommendation from the state board of medical examiners. After receipt of the board's recommendation, if the commission finds that a physician or osteopath is guilty of any of the acts, offenses or conditions enumerated in section 34-24-360, the commission may take any of the following actions or any combinations of the following actions:

(1) Enter a judgment and impose a penalty.

(2) Suspend imposition of judgment and penalty.

(3) Impose judgment and penalty, but suspend enforcement thereof by placing the physician or osteopath on probation, which probation shall be revocable if the commission finds the conditions of the probation order are not followed by the physician or osteopath.

(4) As a condition of probation the commission may require the physician or osteopath to submit to care, counseling or treatment by physicians designated by the commission. The expense of such care, counseling or treatment shall be borne by the physician or osteopath on probation.

(5) The commission may at any time modify the conditions of the probation and may include among them any reasonable condition for the purpose of

the protection of the public or for the purpose of the rehabilitation of the probationer or both.

(6) If a license to practice medicine or osteopathy in the state of Alabama is suspended, the holder of said license shall not practice during the term of suspension.

(i) Complaints submitted for hearing before the medical licensure commission under this section or before the board of medical examiners or testimony with respect thereto shall be absolutely privileged and no law suit predicated thereon may be instituted. Members of the board of medical examiners, the medical licensure commission, any agent, employee, consultant or attorney of the board or the commission, the members of any committee of physicians impaneled by the

board or the commission, any person making any report or rendering any opinion or supplying any evidence or information or offering any testimony to the board or to the commission in connection with an investigation or hearing conducted by the board or the commission as authorized in this article shall be immune from suit for any conduct in the course of their official duties with respect to such investigations or hearings.

§ 41-22-18. Disqualification from participation in proposed order or final decision based upon conflict of interest or personal bias.

(a) No individual who participates in the making of any proposed order or final decision in a contested case shall have prosecuted or represented a party in connection with that case, the specific controversy underlying that case, or another pending factually related contested case, or pending factually related controversy that may culminate in a contested case involving the same parties. Nor shall any such individual be subject to the authority, direction or discretion of any person who has prosecuted or advocated in connection with that contested case, the specific controversy underlying that contested case, or a pending factually related

contested case or controversy, involving the same parties.

(b) A party to a contested case proceeding may file a timely and sufficient affidavit asserting disqualification according to the provisions of subsection (a) or asserting personal bias of an individual participating in the making of any proposed order or final decision in that case. The agency shall determine the matter as part of the record in the case. When an agency in these circumstances makes such a determination with respect to an agency member, that determination shall be subject to de novo judicial review in any subsequent review proceeding of the case.

(2)

Supreme Court, U.S.
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APR 14 1988
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CLERK

No. 87-1441

In The
Supreme Court of the United States
October Term, 1987

—o—

H. RAY EVERS, M.D.,
Appellant,

v.

THE BOARD OF MEDICAL EXAMINERS, *et al.*,
Appellees.

—o—

ON APPEAL FROM THE ALABAMA COURT OF CIVIL APPEALS

—o—

MOTION TO DISMISS THE APPEAL OR, IN THE ALTERNATIVE, MOTION TO AFFIRM THE JUDGMENT OF THE ALABAMA COURT OF CIVIL APPEALS

—o—

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MOTION TO DISMISS THE APPEAL OR, IN THE ALTERNATIVE, MOTION TO AFFIRM THE JUDGMENT OF THE ALABAMA COURT OF CIVIL APPEALS

The Appellees in this action, W. Earle Riley, M.D., William D. Lazenby, M.D., Earnest C. Brock, Jr., M.D., Richard H. Esham, M.D., Garland C. Hall, M.D., Jack Hyman, M.D., Patrick B. Jones, M.D., Stephen G. Lauten, M.D., Julius Michaelson, M.D., Peter W. Morris, M.D., Ira B. Patton, M.D., William C. Waller, M.D., James E. West, M.D., Kenneth C. Yohn, M.D., and James A. Pittman, Jr., M.D., as members of the Board of Medical Examiners, and Robert C. Maynor, M.D., Leon C. Hamrick, M.D., Jerry N. Garley, M.D., Richard Harris, M.D., James L. Walker, M.D., Thomas C. Nolan, M.D., and Dale E. Trammell, M.D., as members of the Medical Licensure Commission of Alabama, respectfully move the Court to dismiss this appeal or, in the alternative, to affirm the judgment of the Alabama Court of Civil Appeals on the following grounds:

1. The appeal does not present a substantial federal question.

2. It is manifest that the questions on which the decision of the cause depend are so unsubstantial as not to need further argument.

3. The decision of the Alabama Court of Civil Appeals is correct and should be affirmed.

STATEMENT OF THE CASE

The Appellant, Dr. H. Ray Evers (hereinafter "Evers"), seeks appellate review of the decision of the Alabama Court of Civil Appeals—an intermediate state appeals court. The appeals court rejected various constitutional challenges which had been asserted by Evers in an attempt to forestall the commencement of a license revocation proceeding initiated against him. A copy of the decision of the Court of Civil Appeals is contained in the Appendix.

On November 25, 1985, a complaint seeking revocation of Evers' medical license was filed with the Alabama Licensure Commission which is the state agency invested by statute with the authority to suspend or revoke a physician's license to practice medicine. The formal complaint against Evers was initiated by the Alabama Board of Medical Examiners which had conducted an investigation of the propriety of certain treatments rendered to a patient of Evers at his clinic in south Alabama.

Prior to the commencement of the license revocation hearing Evers filed suit in the United States District Court for the Middle District of Alabama seeking an injunction barring the conducting of the revocation hearing. After conducting an evidentiary hearing, the federal district court dismissed the complaint of Evers concluding that his claims could best be addressed in administrative and judicial proceedings in the state arena.

After dismissal of the federal litigation, Evers instituted a civil proceeding in the Circuit Court of Montgomery County, Alabama, seeking an order enjoining the prosecution of the disciplinary complaint. The basis for

the relief sought was postulated on several grounds including the alleged due process violations. An evidentiary hearing was conducted by the state court judge.

On October 9, 1986, the trial court denied in entirety the relief being sought by Evers. The trial court's ruling was appealed to the Alabama Court of Civil Appeals which affirmed the trial court's decision in an Order entered on March 18, 1987. An application for rehearing filed by Evers was denied without opinion on April 22, 1987.

Evers sought review of the decision of the Court of Civil Appeals through the filing of a Petition for Writ of Certiorari with the Alabama Supreme Court. While the State Supreme Court initially granted the Writ, it subsequently entered an Order on December 4, 1987, quashing the Writ as being improvidently granted. On February 17, 1988, Evers filed his Notice of Appeal to the Supreme Court of the United States.

THE APPEAL SHOULD BE DISMISSED OR THE DECISION OF THE ALABAMA COURT OF CIVIL APPEALS SHOULD BE AFFIRMED

I. FACTUAL BACKGROUND

In substance, Evers asserts that the constitutional safeguards of due process have been violated by implementation and enforcement of the various Alabama statutory procedures governing the initiation, prosecution and adjudication of physician license revocation proceedings. Evers asserts that these statutes foster an impermissible blending of prosecutorial and adjudicatory functions in violation of his constitutional rights. These arguments of Evers were squarely rejected by the Alabama Court of Civil Appeals and its ruling on this issue was completely

in accord with principles enunciated by this Court. Because the grounds raised on appeal do not present a substantial federal question or are so unsubstantial as not to need further argument, this appeal should be dismissed or, alternatively, the judgment from which the appeal is taken should be affirmed.

Since the interrelationship between the Board of Medical Examiners ("Medical Examiners"), the Medical Licensure Commission ("Licensure Commission"), and the Medical Association of the State of Alabama ("Medical Association") forms the core of the constitutional arguments mounted by Evers, it is imperative that a consideration of his constitutional claims proceed from a clear understanding of the relationship, duties and functions of each of these bodies.

THE STATE MEDICAL ASSOCIATION

The Medical Association of Alabama can trace its inception to 1830 when it was first chartered by legislative act. Since its creation the Medical Association has continuously served in many capacities to foster public health in Alabama. For example, since 1873 the Medical Association has by statute functioned as the "State Board of Health". See e.g., Section 22-2-1 *et seq.* Code of Alabama 1975. In its capacity as the State Board of Health, the Medical Association is granted broad authority and jurisdiction over the enforcement of all laws relating to the public health in Alabama. (Section 22-2-2). Because of the vast reservoir of authority granted by the legislature to the Medical Association, it has been characterized in several Alabama decisions as a "quasi-public corporation". See e.g., *Walker v. Medical Society,* 247 Ala. 169,

22 So.2d 715 (1945); *Parke v. Bradley*, 204 Ala. 455, 86 So.2d 28 (1920).

Membership in the Medical Association is open to any physician licensed to practice in Alabama. Application for membership is made through the county chapters of the Medical Association. Political philosophy of applicants is not a precondition to membership.

According to the records of the Medical Association, Evers was a member of that body for over thirty years, from 1941 until 1974. At that time he was dropped from the rolls because of non-payment of dues. Until his medical license was revoked, he remained eligible for membership in the Medical Association.

Evers asserts in his Jurisdictional Statement that he did not desire affiliation with the Medical Association because it espoused political views with which he did not agree. Whether or not Evers agreed with the political stance taken by the Medical Association on various issues was irrelevant. The evidence clearly established that membership in the Association was open to him regardless of his political or social views, that he had embraced the Association by active membership in the past, and that he voluntarily chose not to continue with his membership.

THE BOARD OF MEDICAL EXAMINERS

Created by legislative enactment (Section 34-24-53 *et seq.* Code of Alabama) the Board of Medical Examiners serves, among other capacities, as an investigative and a prosecutorial body in considering evidence that a physician may be guilty of acts or offenses which would war-

rant suspension or revocation of the physician's license to practice medicine. A comprehensive list of acts which may subject a physician to disciplinary action is outlined in Section 34-24-361.

By legislative declaration the membership of the Medical Examiners is composed of the twelve members of the Board of Censors of the Medical Association. (Section 34-24-53). Board members receive reimbursement for expenses and a nominal per diem for attending board meetings or functions. (Section 34-24-54). Funding for the Medical Examiners is generated by license and examination fees paid by physicians. (Section 34-24-340).

THE MEDICAL LICENSURE COMMISSION

The Licensure Commission is by statute granted the "exclusive power and authority to issue, revoke and reinstate all licenses . . . to practice medicine or osteopathy in the State of Alabama." (Section 34-24-311). The Commission is composed of seven physicians, who are political appointees. The only prequalification for service as a member of the Licensure Commission is that the member be a doctor of medicine or a doctor of osteopathy and be licensed to practice in Alabama. There is *no* requirement that members of the Licensure Commission be members of the Medical Association. (Section 34-24-310). Indeed, at least one of the members of the Licensure Commission which considered the complaint prosecuted against Evers was not a member of the Medical Association.

Funding for the Licensure Commission is provided through the auspices of the Medical Examiners. (Section 34-24-312). However, as found by the Court of Civil Appeals, this funding mechanism is far removed from Evers'

characterization that the prosecutor (the Medical Examiners) pays the judge (the Licensure Commission).

The Licensure Commission sets its own budget annually and maintains separate books and records from those of the Medical Examiners. It has separate employees and its own suite of offices in a building shared with the Medical Examiners. The Commission sets the amount of the license fees which are paid annually by all physicians practicing in Alabama. Payment of the fees is made by checks payable to the Licensure Commission. The funds generated by imposition of the license fees are deposited by the Commission in an account which is maintained in the name of the Medical Examiners. Reimbursement of expenses incurred by the Licensure Commission for such items as salaries, rent, etc., is made by checks drawn on this account. Of utmost importance, however, is the fact that the license fees set by the Licensure Commission generate more than adequate revenue to pay the costs and expenses of the operation of the Commission thereby making it self-supporting.

The Licensure Commission acts in an adjudicative capacity in hearing complaints filed against physicians in which suspension or revocation of the license to practice medicine is sought. Although most complaints before the Licensure Commission are prosecuted by the Medical Examiners, state statutes permit any citizen to institute charges against physicians.

In conducting its disciplinary hearings the Licensure Commission follows the Administrative Procedure Act of Alabama. Additionally, the Licensure Commission adheres to other statutory mandates which insure that physicians

are afforded all due process requirements of notice of charges, right to hearing, right to counsel and right of cross-examination. (Section 34-24-361).

In conducting disciplinary hearings, rulings by the Licensure Commission of a procedural nature, such as on discovery matters, are made by the hearing officer for the Commission. The hearing officer does *not* rule upon the merits of the case as this authority is vested exclusively in the members of the Licensure Commission by specific statute. (Section 34-24-366).

The hearing officer originally appointed in the Evers case was Mark McDonald, an attorney for the Licensure Commission who also functioned on a part-time basis as counsel for the Medical Examiners in certain matters unrelated to the Evers dispute. McDonald's part-time service for the Medical Examiners primarily involved "fielding" legal questions. However, McDonald's principal employment was in behalf of the Licensure Commission and his immediate supervisor was Dr. Leon Hamrick, chairman of the Licensure Commission. Contrary to the contention of Evers that the hearing officer had conducted *ex parte* communications with Wendell Morgan, the attorney for the Medical Examiners, the evidence demonstrated without dispute that McDonald had no such contacts or communications concerning any of the matters involved in the Evers case. Instead, he scrupulously avoided obtaining any reports or information about the investigation or the merits of the case. More important, in order to obviate any conceivable appearance of impropriety, McDonald stepped down as hearing officer in the Evers case prior to the commencement of the formal disciplin-

ary proceeding in order to allow the appointment of another attorney to serve in this capacity.

Evers' contention in his Jurisdictional Statement that the statutes governing the hearings conducted by the Licensure Commission mandate the receipt by the Licensure Commission of *ex parte* communications from the Medical Examiners is simply incorrect. Section 34-24-361(h) Code of Alabama provides in pertinent part that after conducting a hearing and taking evidence "the Commission shall request and consider but not be bound by a recommendation from the State Board of Medical Examiners." This procedure—akin to recommendations frequently made by prosecuting agencies in criminal proceedings—is only a recommendation and, by the clear terms of the statute, is not binding upon the Commission. According to Wendell Morgan, counsel for the Medical Examiners, the recommendation made by the Medical Examiners customarily takes the form of a recommendation of revocation of license which is contained in the prayer for relief in the complaint filed before the Licensure Commission. Neither the terms of the statute nor the procedures followed by the Licensure Commission and the Medical Examiners dictate that the Licensure Commission receive these recommendations through the avenue of an "*ex parte*" communication. Similarly, various of the members of the Medical Examiners and the Licensure Commission who testified during both the federal and state court hearing reiterated that there had been no contact or communication between the members of these two bodies with respect to any pending complaint before the Commission.

II. THE COURT OF CIVIL APPEALS APPLIED THE APPROPRIATE STANDARD OF REVIEW

Evers mounts a frontal assault upon the decision of the Court of Civil Appeals contending that the ruling is bottomed upon an incorrect standard of constitutional review. According to Evers, the intermediate appellate court was in error in concluding that it was its duty "to sustain the constitutionality of legislative enactments involving the state's police power unless those enactments are proven beyond a reasonable doubt to be constitutionally invalid." Citing the early case of *Ex parte Rhodes,* 202 Ala. 68, 79 So. 462 (1918), Evers suggests that this judicial presumption in favor of constitutionality of legislative enactments has no field of operation when fundamental constitutional rights are involved. While dicta to that effect may be found in the *Rhodes* decision, subsequent decisions of the Alabama Supreme Court, and other Alabama appellate courts, have made it clear that the principle of statutory construction set forth in the opinion of the Court of Civil Appeals is indeed the applicable standard.

The requirement that a reviewing court uphold the constitutionality of legislation promulgated in the exercise of the state's police power unless the invalidity of the legislation is proven beyond a reasonable doubt has been applied in cases involving such fundamental personal and constitutional rights as the right of privacy, the right to free speech, the right of due process of law, and the right to equal protection of the laws. See e.g., *Ex parte McCurley,* 390 So.2d 25 (Ala. 1980); *State v. Mills,* 278 Ala. 188, 176 So.2d 884 (1965); *Alabama State Federation of Labor v. McAdory,* 246 Ala. 1, 18 So.2d 810 (1944) *cert. dismd.*

325 U.S. 450; *State v. Woodruff,* 460 So.2d 325 (Ala. Crim. App. 1984); *Craig v. State,* 410 So.2d 449 (Ala. Crim. App. 1981). In short, decisions rendered by the Alabama appellate courts subsequent to the ruling in *Ex parte Rhodes, supra,* have recognized that even in cases involving alleged impairment or infringement of constitutionally guaranteed rights, it is the duty of the judiciary to uphold the validity of legislation promulgated in the exercise of the state's police power unless the party challenging these enactments proves their unconstitutionality beyond a reasonable doubt.

Evers' argument that the Court of Civil Appeals employed the wrong standard of review is nothing more than "quibbling with semantics". Regardless of whether this Court begins its review of the legislative enactments under scrutiny with a presumption, in favor of or against their constitutionality, the end result is the same—the statutes pass constitutional muster.

III. THE RELATIONSHIP BETWEEN THE MEDICAL EXAMINERS AND THE LICENSURE COMMISSION PRESENTS NO DUE PROCESS VIOLATIONS.

Evers argues at great length that the alleged entanglements between the Medical Examiners (characterized as the "prosecutor") and the Licensure Commission (the judge) violate due process guarantees afforded to him. In advocating this position Evers relies almost exclusively upon the decision of the Alabama Supreme Court in *Continental Telephone Co. of the South v. Alabama Public Service Commission,* 479 So.2d 1195 (Ala. 1985) and the ruling of the United States Supreme Court in *Gibson v.*

Berryhill, 411 U.S. 564, 36 L.Ed.2d 488, 93 S. Ct. 1689 (1973). As will be discussed hereafter Evers' arguments are misplaced for at least three reasons. First, the entanglements repeatedly referenced by him do not present nearly the sinister relationships as portrayed. Second, the *Continental Telephone* and *Berryhill* decisions do not sweep to the breadth suggested by Evers. Third, and perhaps most important, decisions of this Court and other appellate courts have specifically upheld administrative structures similar to those involved in this case in the face of due process challenges such as those mounted by Evers.

A. THE CONTINENTAL TELEPHONE CASE

At every stage of his legal maneuvers—federal court, circuit court, Court of Civil Appeals, and Alabama Supreme Court—Evers has raised the banner of the decision in *Continental Telephone Co. of the South v. Alabama Public Service Commission,* 479 So.2d 1195 (Ala. 1985) as his panacea for remedying the constitutional ills of the statutory enactments empowering the Medical Examiners and Licensure Commission. Not a single jurist considering his claims has embraced Evers' far reaching construction of the *Continental* decision since his sweeping interpretation of the ruling in that case is completely unfounded.

In *Continental,* the Alabama Supreme Court found that a utility's due process rights were violated because of the interconnection between the adjudicative body (the Public Service Commission) and the agency which opposed the utility's rate increase request (the Public Staff for Utility Consumer Protection). As shown by the evidence in the case, the members of the Public Staff were direct

employees of the Public Service Commission and had no "legal identity beyond what it was—the Commission's Staff." In essence, the Commission had simply designated some of its full-time employees to serve as advocates in presenting evidence and arguments in opposition to utility rate requests.

The Court of Civil Appeals had little difficulty in finding that the facts in the present case are far removed from those found to give rise to constitutional violations in *Continental*. Here, the adjudicative body—the Licensure Commission—has a separate "legal identity" from the Medical Examiners both in terms of statutory creation and composition of membership. This separate identity is strictly adhered to as evidenced by the testimony presented by the Licensure Commission members who stated that they have no contact or communication with the Medical Examiners with respect to any disciplinary proceedings pending before the Commission until the advent of the formal hearing itself.

The *Continental* case cannot simply be considered in a vacuum and read with the literal interpretation suggested by Evers. If Evers' construction of the *Continental* case is adopted then administrative agency hearings will be a thing of the past in Alabama. Under his theory, any administrative agency which provides funding for its hearing officers and administrative law judges will be barred from conducting adversary hearings. That simply is not the import of the *Continental* decision since any such interpretation would be completely at odds with longstanding precedent of this Court in which the constitutionality of administrative tribunals which combined both prosecutorial and adjudicative functions in a single agency have

been upheld. See e.g. *Withrow v. Larkin,* 421 U.S. 35, 43 L.Ed.2d 712, 95 S.Ct. 1456 (1975); *Federal Trade Commission v. Cement Institute,* 333 U.S. 683, 92 L.Ed. 1010, 68 S.Ct. 793 (1947); *Schweiker v. McClure,* 456 U.S. 188, 72 L.Ed.2d 1, 102 S.Ct. 1665 (1982); *Hortonville Dist. v. Hortonville Educ. Assoc.,* 426 U.S. 482, 49 L.Ed.2d 1, 96 S.Ct. 2308 (1976).

B. THE PRINCIPLES ENUNCIATED IN GIBSON V. BERRYHILL DO NOT MANDATE A FINDING OF DUE PROCESS VIOLATIONS

Relying upon the decision of this Court in *Gibson v. Berryhill,* 411 U.S. 564, 36 L.Ed.2d 488, 93 S.Ct. 1689 (1973), Evers asserts that the interrelationship between the medical Examiners and the Licensure Commission presents a sufficient degree of "possibility of prejudgment of the facts" to warrant condemnation of the state statutes under scrutiny. This accusation is without factual or legal support.

From a factual standpoint, Evers cannot point to a single shred of evidence introduced at any of the hearings intimating in the least that the Licensure Commission had prejudged the case against him. Every witness testifying in the federal court proceeding and the state court action categorically stated that it was a universal practice of the Commission to avoid receiving any information about charges filed before the Commission until the adjudicatory process itself had begun.

From a legal perspective Evers' reliance upon *Gibson v. Berryhill* is misplaced. In *Gibson* the Supreme Court upheld a factual finding of bias on the part of the State Board of Optometry whose membership was composed ex-

clusively of optometrists who were members of the Alabama Optometric Association. The Court declared that disciplinary proceedings instituted by the Optometric Board against optometrists who were not members of the Optometric Association should not proceed since the members of the Optometric Board who would sit in judgment had a personal financial stake in the outcome of the administrative proceedings. Several significant factors distinguish *Gibson* from the matters involved in the present controversy.

First, the *Gibson* decision was rendered prior to the promulgation of the Alabama Administrative Procedure Act. Under the law in effect in Alabama at the time of the *Gibson* decision an optometrist who was confronted with disciplinary action did not have the plethora of administrative and appellate remedies that would now be available to him with the advent of the Administrative Procedure Act.

Second, in *Gibson*, this Court expressed concern about the propriety of the Optometric Board serving in the dual capacity of prosecutor and judge. That simply is not the situation in the present case. Here, the Medical Examiners occupies the status of prosecutor while a separate and distinct entity, the Licensure Commission, serves in the judicial capacity.

Finally, in *Gibson*, the district court and the Supreme Court noted that the membership of the Optometric Board was, by statute, limited to members of the State Optometric Association. This association barred from its membership optometrists who were not self-employed, such as the optometrists who were being disciplined. In the pres-

ent case, the adjudicative body—the Licensure Commission—contains no restrictions on the composition of its members other than a requirement that the members be licensed physicians. Membership in the State Medical Association is not a condition to service on the Licensure Commission.

C. THE FUNDING ISSUE

Time and again Evers claims that his due process rights are violated because the Medical Examiners pay the expenses of the Licensure Commission. It is true that Section 34-24-54 Code of Alabama authorizes a funding mechanism by which the Medical Examiners pay the per diem and travel expenses of members of the Licensure Commission incurred in the performance of the duties of their office. It takes a quantum leap, however, to conclude that this statutory funding procedure means that the prosecutor pays the judge. This analogy by Evers simply will not withstand close examination.

Evers would have the Court believe that the Medical Examiners control the "purse strings" thereby threatening the members of the Licensure Commission with refusal to pay their per diem and expenses authorized by statute if the Commission members do not accede to the wishes of the Medical Examiners. In the first place, as noted by the Court of Civil Appeals, the $100 per diem and expense reimbursement is of such a minimal nature that it is ludicrous to assume that the physicians who serve on the Licensure Commission do so because they are well paid for their efforts. The contrary is true. These physicians perform their service as members of the Licensure Commission as a public duty recognizing that the public

interest dictates that a responsive adjudicative body must exist to consider complaints of improper medical practice by physicians. To suggest that these physicians could be bought for $100 is absurd. The relevant point is that the members of the Licensure Commission receive minimal per diem which is drawn from an account that is funded by license fees set by the Licensure Commission itself.

Funding of the Licensure Commission through license fees generated and paid by physicians is nothing unique to this agency. This funding mechanism is not at all unlike a county commission which obtains revenue through license fees which are then used to finance the operations of both the district attorney's office and the local circuit judges. Nor is it dissimilar from many state agencies, such as the Insurance Department, Revenue Department, and Department of Public Safety, which have established administrative boards which are staffed by administrative law judges or adjudicative panels that are paid by the same agency which prosecutes the charges.

There was no dispute that the funds generated as a consequence of license fees set by the Licensure Commission are more than ample to fund this agency. These license fees are paid by physicians in Alabama via checks made payable to the Licensure Commission. This revenue is deposited in a fund maintained in the name of the Medical Examiners. The expenses of the Licensure Commission for such items as employee salaries, per diem for the commission members, and rent are then paid out of this fund.

Additionally, there was absolutely no evidence offered which even hinted that the Medical Examiners have ever

attempted to utilize the power of the "purse strings" to influence a decision by the Licensure Commission. Indeed, the evidence was to the contrary. The Licensure Commission does not blindly follow the recommendations of the Medical Examiners in the prosecution of cases and has frequently ruled against the Medical Examiners in disciplinary cases.

D. THE ALLEGED EX PARTE COMMUICATIONS

Evers suggests that there were *ex parte* communications between Wendell Morgan, the attorney representing the Medical Examiners, and Mark McDonald, the hearing officer originally appointed in the Evers case. He further contends that such communications are only fostered because the Medical Examiners and the Commission share the same office and because, by statute, the Licensure Commission is to receive recommendations from the Medical Examiners before rendering a decision in an adjudicative case. Once again, Evers misstates the evidence and misperceives the legislative mandates.

The Commission and the Medical Examiners do, indeed, have offices in the same building but they do not share the same office space. Each agency pays its pro rata portion of the rent. To suggest that there is anything inherently wrong in such an arrangement would also imply that there is something sinister about circuit judges in Alabama sharing the same court house with the district attorney.

There was absolutely no evidence of any *ex parte* communication between McDonald and Morgan concerning any of the merits of the underlying facts in the Evers

case. Both McDonald and Morgan testified that they went to great lengths to avoid having any such communications. Further, Dr. Yohn and Dr. Morris (members of the Licensure Commission) stated unequivocally that it was their practice not to engage in any communications with the members of the Medical Examiners with respect to an ongoing investigation and they reiterated that no such communications had occurred concerning the Evers case.

E. McDONALD'S INTERIM SERVICE AS HEARING OFFICER IN THE EVERS CASE AND HIS PART-TIME EMPLOYMENT BY THE MEDICAL EXAMINERS DO NOT VIOLATE ANY CONSTITUTIONAL GUARANTEES

Evers suggests that because McDonald had on occasion in the past performed legal services for the Medical Examiners, he was disqualified from serving as the hearing officer in the Evers proceeding. Evers further argues that McDonald's agreement to step down as hearing officer somehow constitutes an admission of wrongdoing. These assertions are simply without foundation.

McDonald's principal duties related to his employment as the attorney for the Licensure Commission. While he had on infrequent occasions in the past rendered legal services to the Medical Examiners, these services were for matters totally unrelated to the Evers case. Once he was selected to serve as the hearing officer in the Evers matter, McDonald was careful to avoid any appearance of impropriety and scrupulously refrained from participating in any discussions with either Morgan or the Medical Examiners concerning the Evers case.

The fact that McDonald stepped down as hearing officer most certainly does not mean that the Licensure Commission conceded that McDonald was biased or prejudiced in any respect. Instead, when Evers began making his accusations that McDonald should be disqualified from serving as hearing officer because he had on occasion represented the Medical Examiners, the Licensure Commission acted promptly to remove any conceivable basis for Evers' contentions by appointing a new hearing officer who had no past association with either the Licensure Commission or the Medical Examiners. Consequently, the adjudicatory hearing for Evers was not conducted with McDonald as the hearing officer. Furthermore, it must be reiterated that the hearing officer is empowered only to rule upon procedural matters such as discovery disputes. By statute, the persons who act in the capacity of judge and who thus make the ultimate decision on the merits of the Evers case are the members of the Licensure Commission (Section 34-24-366).

F. THE ADJUDICATIVE PROCESSES EMPLOYED BY THE MEDICAL EXAMINERS AND LICENSURE COMMISSION MEET DUE PROCESS STANDARDS

Decisions rendered by this Court subsequent to *Gibson v. Berryhill* confirm the conclusion that there is no inherent constitutional infirmity in the statutory mechanisms empowering the Medical Examiners and the Licensure Commission. The appellate decision providing definitive guidance in this area is *Withrow v. Larkin*, 421 U.S. 35, 43 L.Ed.2d 712, 95 S.Ct. 1456 (1975). There, the Supreme Court considered a challenge to the constitutionality of statutes empowering the Wisconsin Board of

Medical Examiners to serve both in the capacity of investigating agency and adjudicative body in determining whether to suspend or revoke medical licenses. The Wisconsin Board conducted an investigative hearing in an attempt to determine whether formal charges should be filed against a physician. After conducting the investigation, the Board filed its charges and notified the physician that it would conduct a contested hearing to determine whether the physician's license should be suspended. The physician then instituted suit in federal court asking that the Wisconsin statutes establishing the Board and delineating its authority be declared unconstitutional because the Board could not be an impartial arbitrar with regard to the merits of the case since it had acted in an investigative capacity. In a unanimous decision this Court rejected the physician's contentions and ruled that the state statutes vesting both investigative and judicial functions in the board were not unconstitutional.

In beginning its analysis the Court outlined the twofold burden imposed upon the physician in order to prevail:

> "The contention that the combination of investigative and adjudicative functions necessarily creates an unconstitutional risk of bias in administrative adjudication has a much more difficult burden of persuasion to carry. It must overcome a presumption of honesty and integrity in those serving as adjudicators; and it must convince that, under a realistics appraisal of psychological tendencies and human weakness, conferring investigative and adjudicative powers on the same individuals poses such a risk of actual bias or prejudgment that the practice must be forbidden if the guarantee of due process is to be adequately implemented. Very similar claims have been squarely rejected in prior decisions of this court. (Citing cases)"

The Court noted that mere exposure to evidence compiled at the investigative stage was insufficient in itself to impugn the fairness of the members of the Board who also served in an adjudicative capacity at a later adversary proceeding. According to the Court, administrators "are assumed to be men of conscience and intellectual discipline, capable of judging a particular controversy fairly on the basis of its own circumstances." The Court's decision was well summarized in the following passage:

> "It is also very typical for the members of administrative agencies to receive the results of investigations, to approve the filing of charges or formal complaints instituting enforcement proceedings, and then to participate in the ensuing hearing. This mode of procedure does not violate the Administrative Procedure Act and *it does not violate due process of law.*" [Emphasis supplied]

The principles enunciated in the *Withrow* decision have been uniformly applied in other court decisions. See e.g., *Hoke v. Board of Medical Examiners of the State of North Carolina,* 395 F.Supp. 357 (W.D. N.C. 1975); *Martin-Trigona v. Underwood,* 529 F.2d 33 (7th Cir. 1976); *Rite Aid Corp. v. Board of Pharmacy of New Jersey,* 421 F.Supp. 1161 (D. N.J. 1976).

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CONCLUSION

Withrow and its progeny recognize that the blending of investigative and adjudicative functions in a single entity is not of itself violative of constitutional rights. Administrators serving in an adjudicative capacity are presumed to be persons of honesty and integrity unless

the opposite is clearly shown by the party challenging the administrative mechanism. The potential bias of persons serving in such an adjudicative capacity is not shown simply by demonstrating that they serve in the same vocation as the party being disciplined.

Here, the Alabama legislature has, in the exercise of its police power, established an administrative mechanism through which prosecutorial and adjudicatory functions are clearly delineated and made manifestly separate. The fact that there may be some social or business interplay between the attorneys representing the Licensure Commission and the Medical Examiners in matters unrelated to those involved in this controversy does not operate to taint the disciplinary proceedings. Similarly, the fact that the prosecutor and the fact finder are funded from the same source does not render unconstitutional the entire administrative structure. Because the legislative scheme clearly separates the prosecutorial and adjudicative functions and because Evers has failed abysmally in demonstrating any prejudgment of facts or prejudice on the part of the members of the Licensure Commision, this Court should reject Evers' constitutional challenges. The appeal should be dismissed or, alternatively the decision of the Alabama Court of Civil Appeals should be affirmed.

Respectfully submitted,

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APPENDIX

STATE OF ALABAMA—JUDICIAL DEPARTMENT
THE COURT OF CIVIL APPEALS

OCTOBER TERM 1986-87

Civ. 5621

H. Ray Evers, M.D.

v.

The Board of Medical Examiners, et al.

Appeal from Montgomery Circuit Court

BRADLEY, Presiding Judge

This is an appeal from an order of the Circuit Court of Montgomery County, Alabama denying certain declaratory and injunctive relief sought by the plaintiff, Dr. Ray Evers.

Dr. Evers operates a cancer clinic in Cottonwood, Alabama. The record indicates that Evers employed a cancer treatment technique known as an "herbal tumor removal" system which involved the application of certain salves and the prescription of certain vitamins which were designed to stimulate the body's immune system. The treatment also involved the application of a black salve which was designed to burn the patient's skin in an area infected by cancer. The skin was then treated with a yellow salve which was designed to heal the burned skin and cause the cancerous tumor in the patient's body to rise to the skin's surface where it could be removed. Additionally, Evers's herbal tumor removal system required the prescription of vitamins and the administration of enemas containing dimethyl sulfoxide (DMSO), an industrial solvent.

In the latter part of 1984 Mrs. Maxie L. Walker decided to consult the medical authorities about a lump in her right breast. She was advised to undergo surgery and chemotherapy. She did not heed this advice but instead consulted Dr. Evers. Mrs. Walker entered the Evers Clinic in April 1985. During her treatment at the Evers Clinic, Mrs. Walker sustained burns to the right side of her upper torso. Mrs. Walker was admitted to Flowers Hospital the latter part of April 1985 for treatment of these burns. She subsequently died as a result of these injuries.

A complaint was filed with the State Board of Medical Examiners against Dr. Evers. After an investigation the Board filed a complaint with the State Medcal Licensure Commission against Dr. Evers.

Before the Commission could hold a hearing to determine the validity of the complaint filed against him, Dr. Evers filed a complaint in the Circuit Court of Montgomery County against the Board, the Commission, and the individual members of each of these organizations. Dr. Evers sought declaratory as well as injunctive relief to prevent the Board from instituting or proceeding with disciplinary actions against him before the Commission.

After a hearing the circuit court denied Evers's request for relief and he appealed to this court.

Evers asserts that the circuit court erred in refusing to enjoin the proceedings commenced against him before the Commission. In brief Evers attacks the constitutionality of three provisions of Alabama's medical licensing and disciplinary procedure. First, Evers asserts that section 34-24-54 of the Alabama Code is violative

of constitutional due process because of the financial arrangements between the Board and the Commission. Evers also argues that various other provisions create certain conflicts of interest which violate constitutional due process. Second, Evers argues that the appointment powers delegated to the Board by the Alabama Legislature constitute an unconstitutional delegation of legislative authority. Finally, Evers contends that the so-called no-stay provision of section 34-24-367 is unconstitutional.

I. Procedural Due Process

A. Financial Arrangement between the Board and the Commission

Evers's first contention on appeal is that the close financial relationship between the Board and the Commission constitutes a procedural due process violation. Evers argues in brief that the current arrangement between the two is analogous to the type of conflict which would arise in a situation wherein a prosecutor who practices before a certain tribunal compensates the members of that tribunal.

At this point we note that the Board is the investigative and prosecutorial arm of the state's medical profession. *See,* §§ 34-24-36, -53, -56, -57, Code 1975. The Commission, on the other hand, constitutes the adjudicative arm of the profession, and has the exclusive authority to revoke the licenses of physicians who are guilty of professional misconduct. *See,* §§ 34-24-310, -311, Code 1975.

In support of his argument that the financial relationship between the Board and the Commission is violative

of due process, Evers cites *Continental Telephone Co. v. Alabama Public Service Commission,* 479 So.2d 1195 (Ala. 1985). The *Continental Telephone Co.* case, however, can be distinguished from the facts in the present case. *Continental Telephone* involved a hearing before the Public Service Commission regarding a proposed rate increase by a public utility. An organization known as the Public Staff for Utility Consumer Protection attempted to intervene and the intervention was granted. After the Public Service Commission granted only part of the rate increase sought by Continental Telephone Company, Continental and the Public Staff appealed.

On appeal Continental argued that its due process rights were violated because the Public Staff was nothing more than a group of Public Service Commission staff members who had been placed "on loan" to the Governor's Office. The Alabama Supreme Court held that Continental's due process rights were violated because the Public Staff was nothing more than an integral part of the Commission's trial staff under a different label. Thus, the potential for prejudice which existed created a due process violation in and of itself.

The relationship between the Board and the Commission in the present case, however, is much more remote than that of the Public Service Commission and the Public Staff in the *Continental* case. First, the members of the Board are appointed by the Medical Association of the State of Alabama (hereinafter MASA), while members of the Commission are appointed by the lieutenant governor, the speaker of the house, and the governor. *See,* §§ 34-24-53, -310, Code 1975. Second, while both organizations are funded by proceeds from the issuance of

licenses, these proceeds are deposited into a joint account, and each organization establishes its own budget, keeps its own set of books, and uses the joint account to defray expenses incurred. *See,* §§ 34-24-53(b), -54, Code 1975. Finally, the entire amount of compensation received by Board members and Commission members is only $100 per day for days in which they attend official meetings. *See,* 34-24-54, Code 1975. Thus, the respective members of the Board and the Commission, who are licensed, practicing physicians, are far less financially dependent on their compensation than members of the Public Staff in *Continental Telephone.* Moreover, the employer-employee relationship that was present in *Continental* is not present in the instant case.

We recognize that a fair trial before an impartial tribunal or administrative agency is a basic requirement of due process. *Gibson v. Berryhill,* 411 So.2d 564 (Ala. 1975); *In re Murchison,* 349 U.S. 133 (1955). However, it is this court's duty to sustain the constitutionality of legislative enactments involving the State's police power unless those enactments are proven beyond a reasonable doubt to be constitutionally invalid. *Crosslin v. City of Muscle Shoals,* 436 So. 2d 862 (Ala. 1983). We find that Evers has failed to prove that the financial relationship between the Board and the Commission poses any real threat to his due process rights. Thus, we affirm this aspect of the trial court's order.

B. Conflicts Arising out of the Combination of Prosecutorial and Adjudicative Functions

Evers also asserts that various conflicts of interest exist between Commission members and Board members.

Evers says that the fact that the Commission and the Board are housed in the same facilities, as well as the fact that the Board's assistant general counsel serves as the Commission's general counsel, gives rise to a conflict which is violative of due process.

As previously stated, the record reveals that the general counsel for the Board serves as the prosecutor for the Board before the Commission and the assistant general counsel for the Board serves as hearing officer for the Commission. The Commission's hearing officer, however, is neither empowered nor authorized to vote in license revocation cases, and the seven members of the Commission, all of whom are physicians, bear sole responsibility for determining whether a physician's license should be revoked. *See*, § 34-24-11, Code 1975.

Evers also argues, however, that potential due process violations exist because of conflicts of interest which exist between the Board's general counsel, Wendell Morgan, and the Board's assistant general counsel, Mark McDonald. As previously stated, the Board's general counsel serves as the legal advisor to the Board as well as the prosecutor in license revocation cases before the Commission. Additionally, the Board's assistant general counsel, Mark McDonald, serves as the legal advisor to the Commission as well as the hearing officer in matters before the Commission.

Our review of the record, as well as case law in other jurisdictions, however, indicates that no unconstitutional conflict of interest exists in the present case. The evidence reveals that while Mr. McDonald and Mr. Morgan share many common duties in their respective

capacities Mr. McDonald is an employee of the Commission and answers directly to the chairman of the Commission, Dr. Leon Hamrick. Conversely, Mr. Morgan, the Board's general counsel, answers to the Board of Medical Examiners and MASA. The evidence also reveals that before being hired Mr. McDonald was interviewed by Mr. Morgan, the credentials committee of the Board, and the Commission. Thus, even though Mr. McDonald's duties include his service as the Board's assistant general counsel, he was neither hired directly by the Board nor is he always answerable to the Board. For these reasons, Evers's claim that the financial relationship between Mr. McDonald, Mr. Morgan, the Board, and the Commission creates a conflict of interest violative of due process is not supported by the evidence.

Therefore, based upon our review of the record in the present case, we are unable to say that Evers has offered sufficient proof to overcome the presumption that the Board's general counsel and assistant general counsel as well as those physicians serving as adjudicators on the Commission are men of honesty and integrity who are not susceptible to being swayed by potential conflicts which may exist. *Withrow v. Larkin*, 421 U.S. 35 (1975); *see also, Winslow v. Department of Professional & Occupational Regulation*, 348 So. 2d 352 (Fla. Dist. Ct. App. 1977). Since Evers has failed to prove that his procedural due process rights were violated in this case, we find that the formation and compensation schemes of the Board and the Commission do not offend due process.

II. Delegation of Appointment Power to MASA

Evers's next contention is that section 34-24-53 constitutes an unconstitutional delegation of legislative authority to a private organization, MASA.

The statute in question provides in pertinent part:

> "The board of censors of the Medical Association of the state of Alabama, as constituted under the laws now in force, or which may hereafter be in force, *and under the constitution of said association, as said constitution now exists or may hereafter exist,* is constituted the state board of medical examiners and is charged with the duties and clothed with the powers hereinafter prescribed; *said board is hereby vested with authority to adopt and promulgate rules and regulations and to do such other acts as may be necessary to carry into effect the duties and powers which accrue to it under laws now in force or which may hereafter be in force;* and a quorum as provided for by the constitution of the Medical Association of the state of Alabama shall be competent to act."

§ 34-24-53(a), Code 1975 (emphasis ours).

As previously stated, Evers argues that section 34-24-53(a) violates Article IV, Section 44 of the Alabama Constitution by delegating appointment power to MASA and by delegating to MASA the power to decide the number of members on the Board as well as what shall constitute a quorum. The Board, on the other hand, argues that the provision is not constitutionally offensive because it is rationally related to a legitimate State purpose and because sufficient legislative safeguards exist.

It is a fundamental rule of constitutional law that the lawmaking authority of the legislature may not be dele-

gated to any other department or agency, either public or private. *State v. Vaughan,* 30 Ala. App. 201, 4 So. 2d 5 (Ala. Ct. App. 1941). Therefore, when certain legislative powers are delegated to administrative or quasi-administrative officials, it is a prerequisite that adequate standards be established by the legislature so that officials to whom the powers are delegated will not legislate but, rather, will carry out the legislative will. *See, Commission on Medical Discipline v. Stillman,* 291 Md. 390, 435 A.2d 747 (1981). In the realm of public health, however, administrative officials are permitted more control, and, thus, less strict legislative guidelines are required. *Commission on Medical Discipline v. Stillman, supra.*

Article IV, Section 44 of the Alabama Constitution precludes the legislature from delegating its lawmaking authority to MASA; however, this does not mean that the legislature is precluded from delegating any authority to MASA. *See, Yielding v. State,* 232 Ala. 292, 167 So. 580 (1936). Indeed, Alabama courts have consistently held that the legislative delegation of appointment power it could have itself exercised does not constitute an unconstitutional delegation of lawmaking power. *Yielding v. State, supra; see also, In re Opinion of the Justices,* 252 Ala. 559, 42 So. 2d 56 (1949); *Parke v. Bradley,* 204 Ala. 455, 86 So. 28 (1920).

In the present case the legislature created the Board and provided that its membership will be composed of the members of the Board of Censors who, in turn, are selected by the Medical Association of Alabama. Pursuant to its constitutional authority, the legislature could have prescribed a different appointment procedure, for ex-

ample, authorizing the governor and other governmental officers to name the members of the Board. However it chose to repose the appointment power in a quasi-administrative body—the Medical Association of Alabama. *See, Parke v. Bradley, supra.* We find no constitutional impediment to this delegation of appointment power.

Evers also contends that the provisions of section 34-24-53(a) amount to an unconstitutional delegation of legislative authority because the statute allows MASA to determine what comprises a quorum for purposes of Board meetings. Evers contends that the delegation of authority to MASA is unconstitutional because the statute allows MASA to regulate future Board membership via its constitution.

As a general rule, the legislature may delegate to its own appointed administrative agencies the authority to make such minor rules and regulations as are necessary or appropriate for administration or enforcement of its general statutes. *State v. State Board of Medical Examiners,* 209 Ala. 9, 95 So. 295 (1923). Section 34-24-53(a) specifically provides that, in addition to regulation by MASA's constitution, the Board shall also be "constituted under the laws now in force, or which may hereafter be in force." § 34-24-53(a), Code 1975. Additionally, the statute in question vests the Board "with authority to adopt and promulgate rules and regulations and to do such other acts as may be necessary to carry into effect the duties and powers which accrue under the laws now in force or which may hereafter be in force." § 34-24-53(a), Code 1975.

A state has broad power to establish and enforce standards of conduct within its borders relative to the

health of its citizens. *See, Stephens v. Dennis,* 293 F. Supp. 589 (N.D. Ala. 1968). In our opinion, the legislature has not exceeded its authority by delegating certain powers to MASA and the Board because the legislature provided sufficient standards in the statute in question by which MASA and the Board must be governed. Admittedly, the statute in question establishes MASA's power to appoint the Board members under present and future laws of the state as well as under MASA's constitution. The statute, however, then empowers the Board to adopt rules which are necessary to carry current and future legislation into effect, and subrogates MASA's authority to that of the legislature by stating that the Board's composition shall be subject to existing as well as future legislation. *See,* § 34-24-53(a), Code 1975.

Because sufficient guidelines are established to serve as benchmarks for MASA's board appointments, that appointment power is not constitutionally offensive. Additionally, because section 34-24-53(a) sets legislative guidelines for the Board to follow, it is also nonviolative of Article IV, Section 44 of the Alabama Constitution.

III No-Stay Provision

Section 34-24-367 provides, in pertinent part:

> "Any order of the medical licensure commission suspending or revoking a license to practice medicine or osteopathy shall have immediate effect and *shall not be stayed or held in abeyance by any court.*"

§ 34-24-367, Code 1975.

Evers asserts that the so-called "no-stay provision" of section 34-24-367 violates both the due process clause of

the United States Constitution as well as various similar provisions of the Alabama Constitution.

We note, however, that section 34-24-367 applies only to Commission orders actually revoking or suspending a physician's license. The controversy in the present case merely involves Evers's attempt to obtain declaratory and injunctive relief to prevent the Commission from ever hearing the Board's complaint against him.

As a general rule, injunctive and declaratory remedies, such as those sought in the present case, lie within the discretion of the judiciary. Moreover, the courts are reluctant to allow such relief against administrative determinations unless those remedies arise in a context ripe for judicial determination. *See, Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967).

The statute as well as the facts in the present case reveal that Evers's ability to obtain injunctive relief was not yet infringed upon by section 34-24-367. Furthermore, section 34-24-367 does not apply until the Commission has actually issued an order denying or revoking a physician's license. Thus, Evers's constitutional challenge of the no-stay provision is not ripe for adjudication at this time. Should the Commission actually issue such an order revoking or suspending Evers's license to practice medicine, this issue will then be ripe for determination pending Evers's appeal from the circuit court.

We, therefore, refuse to address the issue of Evers's constitutional challenge to the no-stay provision in question.

IV. Conclusion

The briefs and record before us indicate that the relationship between the Board and the Commission is not so inseparable as to violate due process. Additionally, the statutory provisions in question do not constitute an unconstitutional delegation of authority under Article IV, Section 44 of the Alabama Constitution. Finally, Evers's constitutional attack on the no-stay provision of section 34-24-367 is not yet ripe for adjudication, and, therefore, we refuse to address it at this time.

For the foregoing reasons, we affirm the circuit court's judgment denying the declaratory and injunctive relief sought by Evers.

AFFIRMED.

Holmes and Ingram, JJ., concur.